***United States Court of Appeals***

***for the***

***District of Columbia Circuit***

# TRANSCRIPT OF RECORD

BRIEF FOR APPELLANTS AND APPENDIX

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
For the
District of Columbia Circuit

FILED DEC 16 1957

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No. 14,147

STEPHEN S. MADISON and
PUBLIC INVESTMENT CORPORATION,

Appellants

v.

GERARD PHILLIPS, An Infant, etc.

Appellee

954

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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## APPELLANTS' STATEMENT OF QUESTIONS PRESENTED

1. Did the court below err in refusing to direct a verdict in favor of Appellants at the conclusion of the Appellee's case, since there was a total absence of any evidence to show, (1) that Appellants breached any duty owed Appellee, or (2) any consideration to support the oral promises to repair?

2. Did the lower court commit reversible error in it's denial of the motion of Appellant, Madison, for a directed verdict at the conclusion of all the evidence?

3. Was it reversible error on the part of the lower court in it's failure to require the Appellee to elect as to whether he would proceed against the principal or the agent?

4. Did the lower court commit reversible error in it's failure to recognize and apply the law applicable to non-tort liability for breach of oral ~~argument~~ to repair real property?

5. May not this Court under it's present Rule 17 (i), and the prevailing decisions of this Court as well as the Supreme Court, consider and determine questions and issues not raised or considered in the court below?

6. Did the court below err in admitting in evidence speculative and wholly unsupported expert medical testimony?

7. Did the lower court err in it's refusal to grant the Appellants a new trial?

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Appellee

---

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

---

# BRIEF FOR THE APPELLANTS

## JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1291, 65 Stat. 726, to review the action of the District Court in this proceeding. In the Court below the jury following the inadequate instructions of the trial Judge found a verdict for the appellee, and final judgment was entered on said verdict on the 7th day of June, 1957, from which this appeal is prosecuted.

## STATEMENT OF THE FACTS

Gerard Phillips, an infant, less than five years of age, by his mother, Mary Frances Phillips, as next friend, brought his action in the Court below against appellants for damages, alleging that he sustained a linear fracture of the skull and other injury by falling through the rails of the third floor back porch of premises 1201 Columbia Road, N. W. in the District of Columbia on May 5, 1954. The complaint was amended so as to include appellant, Public Investment Corporation as a party defendant. The amended complaint charged the appellants with an oral promise to make repairs in and about the third floor of premises 1201 Columbia Road, N. W. and that their failure to do so resulted in the injuries which the infant suffered.

It was conceded that the corporate appellant was the managing agent of the non-resident owner and that appellant, Madison was the duly constituted agent of the corporate appellant.

Mary Frances Phillips, mother of appellee, testified that in the month of November, 1953 she became a tenant of Mrs. Barber at premises 1201 Columbia Road, N. W. with possession of the entire third floor (Tr. 6, Appellants' App. 11-14). That thereafter, later in the month of November, 1953, Mrs. Barber became no longer connected with the said premises, and she (Mrs. Phillips) became the tenant of appellant, Madison at a rental of $50.00 per month instead of the $75.00 she agreed to pay Mrs. Barber. That they all met in the first floor apartment of Mr. Massey when she agreed to pay $50.00 per month for the rental of the third floor apartment. That thereafter appellant, Madison, came up to the third floor and looked through it and the back porch, and "he said at the time that he would have the porches fixed and that we would have nothing to worry about." (Tr. 12, 13, Appellants' App. 14 )

She also testified that she had five children, the oldest was seven years and the youngest was eight or nine months old, and that Gerard, the appellee, was about two and one-half years old (Tr. 86, 87, Appellants' App. 39-40). That there was no rear entrance to the third floor. That she knew the porch was in a dangerous condition when she moved in (Tr. 91, Appellants' App. 42 ). That she left home the morning of the accident about 10 o'clock, and that she and her husband were at her brother-in-law's home three blocks away when the appellee was injured. That there were her five children, three children from the second floor and one from down the street left in her third floor apartment, unattended by an adult, at the time of the injury (Tr. 92, 93, 94, Appellants' App. 43-44). That she did not see the appellee fall, and after his fall she first saw him at Children's Hospital. She further testified that after the appellee was released from the hospital he did not watch television for very long. That before his injury his bed habits were good; but afterwards they were not as good (Tr. 66-71) Appellants' App. 34-37). That he ties everything that he can get together. That he goes into a rage, jumps up and down. That if there is something he wants to do or something he wants to play with and he cannot do it he will jump up and down (Tr. 70 - Appellants' App. 36-37).

Dr. Hal Curtis Holland was called as a witness by the appellee and he testified that: He was a Neurologist and a Neurosurgeon, and that he had been practicing a little over two years. That six months of his practice was done at Children's Hospital. The doctor was permitted to give opinion evidence without any foundation being first laid for the admission of such opinion evidence (Tr. 30 to 59 - Appellants' App. 17-33). The doctor was permitted to make "an educated guess" on questions involving Orthopedic Surgery, he even went so far as to suggest to counsel the course his examination should take (Tr. 36, 37- Appellants' App. 19-20). The doctor was permitted to speculate on the divergent causes of a fracture such as the one sustained by the appellee (Tr. 37, 38 - Appellants' App. 20-21). The doctor was permitted to

expostulate with and to the jury on "possible and speculative" damages in consequence of the type of fracture sustained by appellee (Tr. 41 - Appellants' App. 22 ). The doctor admitted that his opinion on the need for Ophthalmic treatment by the appellee was negatived by the opinion of the hospital Ophthamologist (Tr. 62, 63 - Appellants' App. 33-A).

The trial judge denied appellant Madison's motion for a directed verdict at the conclusion of all the evidence (Tr. 269, 270 - Appellants' App. 51-2). The trial judge submitted the case to the jury on the issue of the negligence of both appellants, although instructing the jury as a matter of law that appellant, Madison, was the duly constituted agent of the appellant, Public Investment Corporation.

. . The judge failed to adequately instruct the jury on the law applicable to the evidence adduced at the trial (Tr. 298, thru 310 - Appellants' App. 52-54).

The jury returned a verdict against both appellants in the sum of $22, 500. 00.

That thereafter appellants duly filed their motion for a new trial which was overruled by the Court below.

It is from the foregoing judgment of the Court below that this appeal is taken.

## POINTS RAISED ON THIS APPEAL

The Court below erred as follows:

1. In its refusal to direct a verdict in favor of appellants because of the lack of evidence to show that appellants breached any duty owed to appellee; or that the oral promise to repair was supported by any consideration to support said promise.

2. In its refusal to direct a verdict in favor of appellant, Madison, because his acts were performed in the course of his duly constituted agency.

3. In its failure to recognize and apply the law relative to the election of a party where the principal was originally undisclosed.

4. In its failure to recognize and apply the law in respect to the non-tort liability of a lessor who breaches a covenant to repair real property.

5. An appellate court can of its own action consider points on appeal not raised in court below.

6. In permitting speculative and wholly unsupported expert medical evidence to be presented to the jury.

7. In its denial of appellant's motion for a new trial.

## SUMMARY OF ARGUMENT

1. Appellants contend that the evidence fails to establish any negligence on their part. That the evidence failed to show any causal relationship between the injury of appellee and the violation of any duty owed appellee by appellants. That the evidence failed to show that appellants oral promise to repair was supported by any consideration whatsoever.

2. That, if, as the evidence developed, appellant Madison, was the duly constituted agent of appellant, Public Investment Corporation, when he made the oral promise to repair, he could not be personally liable under the doctrine of "Respondeat Superior."

3. That the evidence disclosed that appellant, Madison was acting for an undisclosed principal; but the identity of the principal became known to appellee before trial and as a result appellee joined the principal, Public Investment Corporation as a party defendant. That the moment appellant Public Investment Corporation was joined, and thereafter the trial ensued, it was the duty of appellee to have elected as against which defendant he would proceed as it is reversible error to obtain judgment against both the agent and the principal.

4. The appellants urge a reversal of the judgment on the ground that an oral covenant to repair breached affords no remedy in an action arising "Ex Delicto." That the lower court's failure to direct a verdict for the appellants at the conclusion of the appellee's case constituted reversible error.

5. That even though an issue or objection was not raised or made in the court below this appellate court is vested with the power to hear and determine such issues.

6. That in permitting speculative and wholly unsupported expert medical evidence to be presented to the jury with no foundation thereof, the court below prejudiced the defendants' case and therefore, committed reversible error.

## ARGUMENT

### I. The Court erred in it's failure to recognize and apply the law relative to negligence and proximate cause.

The parents of appellee first rented their apartment on the third floor of premises 1201 Columbia Road, N. W. from a landlord identified as Mrs. Barber (Tr. 11, Appellants' App.13-4). Under the tenancy of Mrs. Barber they paid $75.00 per month. The $75.00 monthly rental was reduced to $50.00 under the agreement which appellant, Madison, effected with appellee's parents and the other tenants (Tr. 12, Appellants' App. 14 ).

After the oral rental agreement had been entered into with the tenants based upon the $50.00 per month for each tenancy the appellant, Madison, in company with another person, went upstairs to the third floor apartment and out on the porch. That while there the friend said the porch was dangerous; there was a big hole in the floor. That appellant, Madison, said he would have the porches fixed (Tr. 12, 13 - Appellants' App. 14 ).

That about two weeks thereafter appellant, Madison,returned to the apartment of appellee's parents, and brought workmen with him. They inspected the apartment and the porch and at that time they promised to "paint and repair the holes in the wall and the falling plaster."

That the third conversation with appellant Madison just before Christmas, 1953, he reaffirmed that the repairs mentioned above would be made. Witness, Howard Barnes, testified that: "The kids ran down to the second floor and told me that Johnny had fallen through the railing." That when he picked Johnny up and took him to the Massey apartment he saw two railings alongside of Johnny (Tr. 106, Appellants' App. 47-48).

It is significant from the forestated testimony that: (1) the alleged promise to repair was made subsequently to the oral rental agreement letting the third floor apartment to appellee's parents. (2) That there is no evidence in the record disclosing just how the appellee fell and through what means other than the hearsay testimony of witness, Barnes. (3) That there was no evidence of any defect in the railings through which the appellee fell according to the hearsay testimony of the witness, Barnes. (4) That appellant, Madison's attention was never directed to any defect in the railings.

The law is well settled in this jurisdiction to the effect that an oral covenant to repair made after the commencement of the tenancy is without consideration and imposes no liability on the landlord. See, Fortner v. Moses, 49 A.2d 660 (Mun.App. D.C.), 1946 and Karl W. Corby Company v. Zimmer, 99 A.2d 485 (Mun.App. D.C.), 1953.

In the latter case the court said:

> "It is an established rule that where the landlord has no existing obligation to repair premises, a promise by him to repair is "nudum pactum" unless supported by a new consideration."

The court cited the Fortner Case, supra, and observed:

> "In the Fortner Case just cited the landlord repeatedly promised to repair the back steps of the tenants house. He failed to do so and the tenant's wife was injured when she fell because of the defective condition of the steps. We affirmed a directed verdict for the landlord, ruling that the promises would not render him liable as they were supported by no new consideration."

Since the tenancy had begun when appellee's parent pointed out the defects of the porch, the promise to repair was "nudum pactum."

It may be noted that the trial judge in instructing the jury on the issue of negligence, said:

> "I will define negligence to you in a broad sense and I will be a bit more specific on certain propositions of law now and will tell you that upon the evidence in this case the defendant Madison acted as agent for the defendant Public Investment Corporation, and if you find that Madison promised to make repairs to the porch such promises were binding upon the defendant, the Public Investment Corporation." (Tr. 306, Appellants' App. 52 ).

The foregoing charge of the trial judge is inadequate in that it fails to dispense with the doctrine of "respondeat superior." It fails to explicate any theory of law upon which an agent acting within the scope of his authority that renders the agent liable for his principal's breach of contract to repair. In the case of Harrison v. Mortgage Investment Company, 61 App. D.C. 155, 58 F.2d 887, the declaration alleged that the stairs were used in common by all the tenants in the building in going to and coming from the alley in the rear. That the defendant negligently failed to have the space between the two iron railings and the steps along either side of the stairway closed in such manner as to prevent an infant using the stairway from falling through the open space. The evidence adduced at the trial was in support of the allegations of the declaration.

This court held,

> "that the evidence disclosed that the infant, who was two years of age, sustained her injury not because of any defect in the material or workmanship, but because of the character of the structure itself. That the structure itself was sufficiently safe to provide safe passageway to anyone using due care, and while ordinarily a small child is not to be held responsible for contributory negligence, still before the owner of the premises can be held liable, there must be a failure on his part to perform a duty which the law imposes."

The Court further stated:

> "that there is no law which required the landlord to provide safeguards not otherwise necessary in the ordinary use of the premises because of the possibility to injury to a small child." [Emphasis supplied]

The court further observed:

> "that the parents had leased the apartment with full knowledge of the structural condition of the stairway. That neither one nor the other would now be heard to complain of any injury resulting alone from the structural character of the stairs. That the infant child stood in no better position than the parents. That the infant was using the premises in the right of her parents as tenants and if the circumstances are such that the parents cannot recover neither can the child." [Emphasis supplied]

Here this court was dealing with a case involving the common use of a stairway in an apartment house building. The law imposes upon the landlord the duty of maintaining proper repairs and reasonably safe passageway. Assuming "arguendo" that there was a valid enforceable covenant to repair in the instant case, the record does not disclose any evidence to show that any negligence of the appellants was the proximate cause of the injury. There is no evidence to show that the infant fell through the railings. There is nothing to show that there was any defect in the railings if he did fall through them. Two railings

were found near the infant after he was discovered on the ground and they were turned over to the parents by witness, Barnes. (Tr. 108, Appellants' App48-49). The only evidence relative to the condition of the railings came from witness, Barnes, who testified that before the injury he had seen a railing on the third floor loose (Tr.106-7, Appellants' App. 48 ). There was no evidence as to when he saw this railing, or its location on the porch or how insecure it was. There was nothing to show what type of force could be repelled by the loose condition of the rail that he described. The crucial applicable test under this "arguendo" assumption is that since there is no evidence revealing circumstances under which the infant fell, if he did fall, there is no way of determining just what would result from the use of the porch by one in exercise of due care. The burden was upon the appellee to show all of the circumstances described above. Certainly the jury should not have been left to conjecture as to the elements of proof, the production of which the law imposes on the appellee. Significantly, the appellee failed to introduce in evidence the two railings which were found near the infant. Witness Barnes said he turned them over to Mrs. Phillips, the mother of the appellee (Tr. 108, Appellants' App. 48-49). A further element to be considered is that the parents left their five children in the apartment with four other children, the oldest of which was 11 years of age. Certainly the appellee's failure to offer the railings in evidence or to produce the 11 year old child as a witness may be construed that if produced their evidence would have been antagonistic to appellee. There was no evidence of structural defect which efficiently caused the injury of the appellee. Since the appellee failed to prove any specific negligence on the part of the appellants, the jury in effect was permitted to infer negligence from the fact that the appellee sustained a fracture of the skull after being found lying in the back yard of premises 1201 Columbia Road, N. W. near two railings. What the appellee, in fact, relied upon to prove negligence was nothing more than the

doctrine of "Res ipsa loquitur". This doctrine was wholly inapplicable because the control of the premises was not in the appellants. See Bowles v. Mahoney, 91 U.S. App. D.C. 155.

The position taken by the appellants hereinabove find support also in Doyle v. Union Pacific Railroad Co., 147 U.S. 413, 13 S.Ct. 333 and Crawford v. Orner & Shayne, Inc., et al, 331 Ill. App. 568, 73 N.E. 2d 615.

The court below barred recovery on the part of the parent, Mary Frances Phillips because of contributory negligence. The court should have followed the ruling of this court in Harrison v. Mortgage Investment Company, supra. It was incumbent upon the court below to have held that since ordinary and careful use of the porch and railings would not have produced injury, the parent was precluded from recovering, and the child who was using the premises in the right of his parents, as tenants, is also denied the right of recovery. As stated by the court,

> "there is no duty imposed on the landlord to guard against possible injury to a small child."

Appellants say, to impose such a duty upon the landlord would ripen a covenant to repair into an indemnity to maintain safety of use, which would make the landlord an insurer of the premises.

II. The Court erred in its refusal to direct a verdict for Appellant, Madison.

The record before this Court, considered as a whole, discloses that appellant, Madison's relationship to the parents of appellee, was one of two; that he was either acting as an agent of an undisclosed principal or he was acting as an agent.

Assuming "arguendo", that appellant, Madison was acting as the agent of the landlord in his relations with appellee's parents, it was the duty of the trial Judge to have dismissed the action against him in

accordance with his motion addressed to the trial Judge (Tr. 269, 270, Appellants' App. 47-48).

The law has long since been settled in this country by the Supreme Court of the United States, in respect to the non-liability of an agent who contracts for his principal within the scope of his employment. Thus in the case of Downs v. Bankhead, 44 App. D.C. 101, 105, this Court speaking through Justice Van Orsdel, said:

> "If the contract be unsealed and the meaning clear it matters not how it is phrased, nor how it is signed, whether by the agent for the principal or with the name principal by the agent or otherwise. Where the principal is disclosed, and the agent is known to be acting as such, the latter cannot be made personally liable unless he agrees to be so."

On the other hand if the appellant, Madison, is to be held as the principal or landlord, then and in that event there is no liability on the part of appellant, Public Investment Corporation, the discussion of which is in the succeeding argument. If appellant, Madison, was acting for an undisclosed principal as is developed in the succeeding argument, then his failure to make repairs as an agent does not as such render him jointly liable with the landlord, in tort, for failure to make such repairs. See Bell v. Josselyn, 3 Gray (Mass.) 309, 63 Am. Dec. 741.

## III. The Court below erred in its failure to require Appellee to elect to hold principal or agent.

The record of this case in the court below shows beyond question that at the time of the commencement of appellee's parents tenancy at 1201 Columbia Road, N.W., that appellant, Public Investment Corporation, was an undisclosed landlord. That insofar as the parents of the appellee were advised appellant, Madison, was their landlord.

The interrogatories served upon appellant, Madison, by the appellee and the answers thereto by Madison apprised the appellee for the first time that the appellant, Public Investment Corporation, was the landlord of premises 1201 Columbia Road, N. W. covering the period from November, 1953 through May 5, 1954. The said answers to the interrogatories were sworn to, by Madison, on December 17, 1956 (Tr. 126-128 - Appellants' App.49-50). Said answers left nothing to conjecture since they clearly disclosed that the appellant, Public Investment Corporation, was the landlord of the premises 1201 Columbia Road, N. W., and appellant, Madison, was the agent for said corporation. That as the result of the reception of the said answers to the said interogatories the appellee obtained leave of court to, and did, file an amended complaint to which the corporate appellant was made a party defendant (Appellants' App. 1-3).

The law is well settled that when the agent acts for an undisclosed principal and the identity of the principal is discovered by the plaintiff before trial, the plaintiff is put to his election "in limine", for if there is an agency and nothing more, the judgment can never be joint. The plaintiff must elect to go to the jury either against the agent or against the principal, but never against both. See, The Jungshoved, 2nd Cir.; 290 F. 733, (Cert. denied, 263 U. S. 707, Barrell, et al v. Newby; 7th Cir.; 127 F. 656, Tuthill v. Wilson, 90 N. Y. 423, 428 and Berry, et al v. Chase, et al, 6th Cir., 179 F. 426.

It was held in Ford v. Williams, 62 U. S. 287, that if a party is informed that the person with whom he is dealing is merely the agent of another, and prefers to deal with the agent personally on his own credit he will not be allowed afterward to charge the principal, but when he deals with the agent without any disclosure of the fact of his agency, he may elect to treat the after discovered principal as the person with whom he contracts.

In the case of Campbell v. Murdock, et al, 90 F. Supp, 297 (N. D. Ohio, E. D.) 1950, the court said:

> "If an agent does not disclose agency or identity of principal at the time a contract is made for improvement of the principal's real estate, the agent may be liable on the contract, but if at the time the action to foreclose a mechanic's lien is commenced, plaintiff has learned of the undisclosed principal, he must elect whether to proceed against the agent or the principal, and he cannot sue both."

See also the most recent decision of the Georgia high court in the case of Washburn Storage Company v. Elliott, 93 Ga. App. 456, 92 S. E. 2d 28 (1956), where that court said:

> "One who is in fact merely an agent and acts with authority of an undisclosed principal may at the election of the opposite party, be held as a principal therein, but contractual liability of such undisclosed agent and principal is not joint, and the injured party either elect against whom he desires to proceed."

See, Hospelhorn v. Poe, 174 Md. 242, 198 A. 582.

The appellants moved for a directed verdict at the conclusion of the appellee's case. This motion was denied (Tr. 143, Appellants' App. 51 ). At the conclusion of all the evidence appellant, Madison, moved for a directed verdict. To use the language of counsel for the defendant, Madison, he said: "I move that the case be dismissed as to Madison because there is nothing to show that he was acting in an individual capacity, that all of his acts were in behalf of the Public Investment Corporation, who was representing the owner, Dr. Thomas A. Stevens. I think the matter ought to be dismissed as to him." The trial judge denied the motion (Tr. 269, 270, Appellants' App. 51-52).

That in the light of the foregoing decisions and the unchallenged facts, the law demands that the appellee elect as to which of the two defendants he would seek a judgment against. The law is likewise in accord that the election must be made before judgment is entered

because there can be no joint judgment against principal and agent upon a breach of an oral covenant to repair real property. It is for these reasons that the appellants urge this court to reverse and remand the judgment.

IV. The Court erred in submitting to the jury the issue of negligence resulting from breach of an oral agreement to repair.

The law is well settled in this country by the great weight of authority that the breach of landlord's covenant to repair real property affords no basis for tort liability. The remedy of the tenant has always been and is now an action arising "ex contractu", and not "ex delicto". The measure of damages for such breach is limited to the difference between the rental value of the premises with repairs and the rental value without repairs. Fourteen different jurisdictions in this country, who have had occasions to determine the issue, hold that the landlord is not liable in tort for his breach of covenant to repair. Let us therefore analyze the following state court decisions.

In Bruszacynaska v. Ruby, 267 App. Div. 539, 47 N. Y. S. 2d 788 (1944), the court said:

> "It is well settled law of this state that an action in tort will not lie for a breach of covenant to repair."

In the case of Ward v. Dan Cohen Realty Co., 16 Ohio Supp. 27, (1945), wherein it appeared that a defective ceiling fell and injured the tenant and his customers, and damaged his goods; the court held that the landlord was liable for the property damages but was not liable for the personal injuries. "The fact that the landlord carried liability insurance does not support an inference of an admission of liability for personal injuries resulting from a total failure to make agreed repairs", said the court in Salsman v. Frisch, 276 Mass. 228, 177 N. E. 7 (1931).

In Hart v. Coleman, 192 Ala. 447, 68 So. 315, the court held:

> "That a landlord is not liable in tort for injuries to a tenant resulting from a landlord's failure to make repairs or his breach of agreement to repair unless the defect was known to him and he concealed it. That an agreement between landlord and tenant upon tenant's threat to vacate unless repairs were made, without notice effective to terminate lease or obligation to continue beyond term, was without consideration and could not support tenant's action "ex contractu" for personal injury from such breach."

In Redden v. James T. McCreery Co., Inc., 123 W. Va. 367, 15 S. E. 2d 150, the court said:

> "Generally, a promise by a landlord to repair leased premises, where made without consideration does not impose any liability on the landlord for injury caused by lack of repairs." Citing Bailey v. First National Realty Co., infra.

The court stated further:

> "A gratuitous promise made by a landlord to his tenant to examine and repair, if necessary, leased premises, imposes no liability on the landlord for injury to the tenant caused by failure of the landlord to repair same."

The Supreme Court of North Carolina said in the case of Mercer v. Williams, et al, 210 N. C. 456, 187 S. E. 556,

> "That where landlord expressly agrees to repair demised premises, liability for personal injuries to tenant, his family, servant or guests sustained by reason of breach of agreement and not within parties contemplation, and damages arising are too remote to permit recovery against landlord, whether action be in contract or tort."

Accord: Leavitt, et ux v. Twin County Rental Co., 222 N. C. 81, 21 S. E. 2d 890 and Newman v. Early, 176 Va. 263, 10 S. E. 2d 885.

The Illinois Appellate Court induldged in a learned explication of the issues in the case of Crawford v. Orner & Shayne Inc., et al, 331 Ill. App. 568, 73 N. E. 2d 615. In this case there was an oral covenant to repair and keep in repair certain window screens, made by the landlord to the tenant. The tenant's two year old daughter fell with the screen from the window to ground level. The tenant sued as next friend of the injured child, who sustained a fractured skull and other injuries, alleging negligence on the part of the landlord for his failure to repair the defective screen which resulted in the injuries sustained by the child. The complaint, further, alleged negligence on the part of the landlord in the defective and loose fitting of the screen. The landlord's motion to dismiss the complaint was granted and the appellate court affirmed the ruling of the lower court, and in so doing said:

> "What special circumstances would render the landlord liable to his tenant for personal injuries received in consequence of a breach of contract to make repairs..... On principle there can be no such liability."

In Bailey v. First Realty Company, 305 Mass. 306, 25 N. E. 2d 712, the Supreme Judicial Court of Massachusetts, held, that a representation by landlord's broker, by whose representation the landlord was allegedly bound, that the apartment would be put in perfectly safe condition and that landlord never let property run down, did not impose any obligation upon landlord to maintain apartment in safe condition so as to render landlord liable for tenant's injury, since brokers statement went no further than a promise to make repairs in order to put premises in safe condition, and a mere failure to repair furnishes no basis for an action in tort for injuries caused by such failure.

In the case of Dick v. Sunbright Steam Laundry Corp. (1954) 307 N. Y. 422, 121 N. E. 2d 399, the New York Court of Appeals said:

> "A landlord's covenant to repair imposes upon the landlord no liability in tort either to tenant or third party."

The court cited with approval, Cullings v. Goetz, et al, 256 NY. 287, 176 N.E. 397. The opinion in the Cullings Case was written by Justice Benjamin Nathan Cardozo, while he sat as Chief Justice of the New York Court of Appeals. This case involved an oral agreement to repair. The plaintiff sustained injuries as the result of a garage door falling on him when he attempted to open the door in order to park his car in the garage. One of the questions submitted to the jury for factual determination was whether the owner had entered into an oral agreement to make repairs, and in the event of such agreement did the owner negligently fail to make said repairs after notice of the need. The jury found for the plaintiffs and the owner appealed. The court in its holding, said:

> "The subject has divided juridical opinion. Generally, however, in this country as in England, a covenant to repair does not impose the lessor with liability in tort at the suit of the lessee or others lawfully on the land in the right of the lessee. It is the majority rule. The doctrine, wise or unwise in it's origin, has worked itself by acquiescence into the tissues of our law. It is too deeply imbedded to be superseded or ignored. . . . .if there is no remedy for the tenant, there is none for visitors or relatives present in the tenant's right."

See, the annotation, 163 A. L. R. 300 through 341.

The leading case decided by the Federal Circuit Court of Appeals is the case of Home Owner's Loan Corp. v. Huffman, 8th Cir., 124 F. 2d 684, cert. denied, 316 U. S. 681. In that case the lessee rented the house upon the conditions that the lessor would repair the steps leading to the basement and maintain them in reasonably safe condition. The lessor failed to keep the steps in reasonably safe condition and as a result of the failure plaintiff tripped and was injured. He brought suit to recover for the personal injury thus sustained. The plaintiff recovered in the trial court. Upon appeal, the court held:

> "The action is not for breach of contract, but sounds in tort, that it being true it is not material what if any promises or agreements were made by

> the lessor to the lessee as to the making of repairs. It is well established under the Missouri law that a landlord cannot be held liable in tort, for personal injuries received by a tenant or one in the premises in his right, as a result of the landlord's breach of his contract to repair."

In the case of Dellangelo v. Home Owner's Loan Corp. (D.C., S. D. NY. 1943) 49 Fed. Supp. 71, the court cited with approval Cullings v. Goetz, et al, supra, and concluded by saying:

> "That where the lessor leases premises to a tenant with or without a covenant to repair, no liability attached to the lessor in tort for failure to repair."

In the light of the overwhelming weight of competent authorities as cited above the appellants say that the lower court erred in submitting to the jury the question of negligence as a basis for breach of covenant to repair.

## V. This Court is vested with power to consider and determine issues and objections not raised below.

This Court is vested with the power, both by its Rules and its decisions to consider issues and objections raised in this Court for the first time. See Rule 17(i) - United States Court of Appeals, D.C. General Rules.

This Court said in the case of Shokuwan Shimabukuro v. Higeyoshi Nagayama, 78 U.S. App. D.C. 271, 140 F. 2d 13, at page 273 of the opinion:

> "The power of an appellate Court on its own motion to consider grounds of error not raised below is not one which should be exercised in an ordinary case."

"Citing Mr. Justice Stone in Duignan v. U. S., 1927, 274 U.S. 195 at page 200, 47 S. Ct. 566, at page 568, 71 L. Ed. 996 said,

> "This Court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed."

"The Court went on to say:

> "But where it is apparent to the appellate court on the face of the record that a miscarriage of justice may occur because counsel had not properly protected his client by timely objection, error which has been waived below may be considered on review."

"Citing Sibbach v. Wilson & Co., Inc., 1941, 312 U. S. 1 at page 16.

Mr. Justice Black has recently said:

> "There may always be exceptional cases or particular circumstances which will prompt a reviewing court or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below."

"Citing Hormel v. Helvering, 1941, 312 U. S. 552, 557, this Court went on to say:

> "Heretofore this court has noticed error which parties waived by failure to object at the trial court, to avoid injustice in criminal cases. There is no logical reason for refusing to exercise our power to notice fundamental error in cases where personal or property rights are involved and our Rule 17(i), which states the principal, makes no distinction between civil and criminal actions. Citing: "Points Not Presented." "Points not presented (errors not assigned) in criminal cases from the district court according to the rules of the court will be disregarded, though the court, at it's option, may notice and pass upon a plain error not presented or assigned."

This Court, in Montgomery v. Virginia Stage Lines, 89 App. D. C. 213 (1951), again stated at page 217 of the opinion:

> "The power of an appellate court on its own motion to consider grounds of error not raised below is not one which should be exercised in an ordinary case."

> "But where it is apparent to the appellate court on the face of the record that a miscarriage of justice may occur because counsel has not properly protected his client by timely objection, error which has been waived may be considered on review." Citing the Nagayma Case, 78 App. D. C. 271, 140 F. 2d 13.

VI. The admission of expert medical evidence involving speculation as to the possible effect of a linear skull fracture was reversible error.

The jury was permitted to receive an academic lecture from Doctor Hal Curtis Holland, a two year Neurologist and Neurosurgeon, without the advantage of "foundation evidence" upon which to support the "educated guesses" of the doctor. The doctor's examination of the appellee consisted of ten days next preceding April 13, 1957. Counsel was permitted to inquire of the doctor the following question: "Would a fall by a child two years old, as in Gerard's case, from a porch and his head striking the ground be consistent with a fracture of this type? (Tr. 39, Appellants' App.21-2). There was no evidence introduced at the time this question was propounded or at any time during the trial to show that the appellee fell from a porch. Counsel was permitted to ask the doctor the effect that a fracture of this kind could have on "someone who has received an injury to the extent that he has and at his age?" The cauistry of such a question is evidenced by the following inquiry of the doctor rather than his response to the propounded question: "A. Could I ask a question. Now, would you like me to discuss the possibility in general terms or specific?" (Tr. 39, Appellants' App.21-2). The foregoing is indicative of the type of evidence that the appellants were subjected to at the hands of the jury. When the doctor answered the question he said in part: "Following a head injury of type there are several possibilities and even probabilities (emphasis supplied) that may appear." (Tr. 41, Appellants' App. 22). The doctor then proceeded to enumerate: "convulsions, seizures, loss of consciousness and perhaps violent movement of their arms and legs." (Tr. 41, Appellants' App. 22 ). The court below then assisted him in his testimony with the

following statement: The Court: "In other words, it would be rather in the field of epilepsy?" The doctor obviously appreciating the able assistance of the court replied, "Yes Sir," and continued his expostulation of possible effects of brain damage (Tr. 41, 42, Appellants' App. 22-3). Appellants not only challenge the co-mingling of the terms "possible and probable" as constituting confusion in the admission of irrelevant evidence, but the appellants also challenge the testimony on brain injury in the absence of evidence to show the type of injury sustained to the brain of the infant. The infant suffered only a linear fracture, which is nothing more than a fracture in the line, a little crack, a narrow crack running up over the portion of the skull, and of little significance (Tr. 36, Appellants' App.19-20). There were no fractures to any other part of the appellee's body, so that his impaction with the ground was not too severe. The fracture was not depressed because the x-ray showed no bending of the fracture lines. The x-ray picture showed that the lines of the fracture radiated from the point of impact. In all of the doctor's medical philosophy he has yet to give us a standard of the infant's injury, or to state whether the injury involved the anterior, middle or posterior of the fossa of the infant's skull. Medical science is agreed that the degree of brain damage varies greatly, from minute hemorrhage of little significance, laceration upon the surface or deep within, to complete pulping of major portions. The doctor's explication of the coma, or unconscious period of the infant, was paradoxical without describing the causes of coma or enumerating the division, such as, (urémic, diabetic, alcoholic, impact, etc.), the doctor was content to go to the jury with his pragmatic conceptions, and evolved the unilateral theory, that serious brain injury is evidenced by coma. This conclusion of the doctor is not supported by evidence showing that a spinal puncture was made following recovery from coma after head injury, for the collection of three tubes of about five cubic centimeters each. This is done in order to ascertain whether the pressure therein exceeds ten to twelve millimeters of mercury for the purpose of reaching a diagnosis of brain injury.

See, Vol. I, Gray's Attorneys' Textbook of Medicine, page 252, Sec. 10.29. The doctor without factual basis or medical diagnosis takes an "educated guess" on the development of epilepsy and paints an epileptic future for the infant. The doctor was unmindful of the considered opinions of Doctors Glasser and Shafer (Vol. I, Gray's Attorneys' Textbook of Medicine, page 253, Sec. 10.31) wherein it is stated, that in cases of major damage to the brain epilepsy appears within ten days from the date of injury, and generally the onset is from six months to two years after injury, in patients up to seven years of age. (ibid)

In discussing sequelae, Doctors Glaser and Shafer, supra, state that in their study of 255 brain injury cases, there were no sequelae in the cases of patients under ten years of age. See, Vol. I, Gray's Attorneys' Textbook of Medicine, page 257, Sec. 10.36.

This court held in the case of Henkel v. Warner, 78 U.S. App. D.C. 197, 138 F.2d 934, that permitting a witness to answer a hypothetical question which was uncertain, ambiguous and self-contradictory was improper. It was said in Dairymen's Milk Co. of Pittsburgh v. McCormick Co., Inc., 3rd Cir., 114 F.2d 736, that a hypothetical question asked an expert witness should include a statement of all the material facts and should not assume facts not warranted by the evidence. As the evidence developed the doctor did not treat the appellee toward recovery but was called to interpret the medical history. As the court stated in Grobelny v. W. T. Cowan, Inc., 2nd Cir., 151 F 2d 810:

> "The general rule is that self-serving statements are not admissible when made by a doctor who is not called to treat a party to a law suit as a patient but only to examine him to determine his condition without an attempt to treat or cure. There is then no incentive to speak truly in order to give the doctor a true basis for diagnosis to enable him to prescribe the proper medical treatment and there may be some inducement to distort facts for the purpose of a trial if one is in the offing."

For the reasons advanced the admission of the medical testimony of Dr. Holland as pointed out above was reversible error.

## CONCLUSION

In the light of the reasons advanced and the cases cited hereinabove appellants urge upon this Court a reversal of the judgment below.

ROBERT J. HARLAN

J. FRANKLIN WILSON

547 Florida Avenue, N. W.
Washington, D. C.

Attorneys for Appellants

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# APPENDIX FOR THE APPELLANT

[Filed January 15, 1957]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

GERARD PHILLIPS, an infant, by Mary F. Phillips, his mother and next friend,

MARY FRANCES PHILLIPS,

Plaintiffs

v.

STEPHEN S. MADISON,

and

PUBLIC INVESTMENT CORPORATION, a corporation
1330 You Street, N. W.,

Defendants

C. A. No. 3154-54

## AMENDED COMPLAINT FOR DAMAGES - NEGLIGENCE

1. The action is for injuries and damages sustained arising in an accident in the District of Columbia, and the amount claimed exceeds $3000.00.

2. On to wit, May 5, 1954, the defendants were rental agents for the premises known as 1201 Columbia Road, northwest, and in such capacity managed the said real estate and were in control of and responsible for the maintenance and repairs made and required to be made to said real estate. That the owner of the real estate at said time and at the present time as plaintiffs are informed and allege resides in Mobile, Alabama, and the defendants acted for said nonresident owner in the rental of said real estate and in the management and maintenance thereof.

3. On to wit, November 15, 1953, the defendants rented to and accepted the adult plaintiff and her husband as tenants for the third floor of the premises, and which said third floor included a rear porch as part of the area rented by the adult plaintiff and her husband.

4. That the adult plaintiff and her husband were tenants occupying and paying rent for said third floor from November 1, 1953 to and after May 5, 1954, and said tenants lived on said third floor with their minor children, all of which was well known to the defendants.

5. The defendants, prior to May 5, 1954, had inspected the third floor and porch, and defendants had knowledge that the rear porch was in a defective and unsafe condition, and the defendants represented to the adult plaintiff and they agreed to make needed repairs to put said porch in a safe and proper condition. Further, the defendants agreed and represented to said adult plaintiff that they would place a lock required and needed for the third floor rear door leading to said porch.

6. The adult plaintiff relied upon the defendants performing their agreement and representations to make the needed repairs and paid rent to the defendants in anticipation that said repairs would be made.

7. On to wit, May 5, 1954, plaintiff, Gerard Phillips, then two years of age, while on the said rear porch, fell to the first floor concrete walk when certain defective wooden balusters collapsed and failed to hold, causing said minor plaintiff to be thrown to the ground below.

8. The minor plaintiff sustained his injuries by reason of the failure of the defendants, who were engaged in the real estate and property management business in the District of Columbia at said time, to make needed repairs to the rear porch and in failing negligently and carelessly to maintain said rear porch in a reasonably safe condition, and in negligently failing to make repairs after defendants had represented and agreed to make said repairs, and all being in violation of District of Columbia building regulations then and there in force and in effect.

9. As a result of defendants' negligence aforesaid, the minor plaintiff suffered a fractured skull of both midparietal areas and he remained semi-comatose until June 11, 1954, and paralysis to the sixth right cranial nerve, secondary to the skull fracture, and atrophy of the calf of the right leg, and paresis of the right eye, and he suffered pain and suffering, and his injuries still continue and will continue for an indefinite time, all to his damage in the sum of $65000, and the adult

plaintiff incurred expenses for his hospitalization and treatment and special care and attention given to him, and she claims damages in the sum of $10000.00.

Wherefore, the minor plaintiff, Gerard Phillips claims damages and judgment in the sum of $65000 and the adult plaintiff claims judgment against the defendants in the sum of $10000.00.

LOUIS GINBERG
FRED SOMKIN

by: /s/Louis Ginberg
837 Warner Building
Attorneys for Plaintiffs

Plaintiffs demand a trial by jury on the issues.

/s/ Louis Ginberg

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[Filed February 5, 1957]

## ANSWER TO AMENDED COMPLAINT FOR DAMAGES FOR ALLEGED NEGLIGENCE

Comes now Stephen S. Madison, by his attorney, J. Franklin Wilson, and for answer to the amended complaint filed herein, or to so much thereof as he is advised is material, states as follows:

### FIRST DEFENSE

The plaintiffs fail to state a cause of action upon which relief can be granted against this defendant.

### SECOND DEFENSE

This defendant denies that he was the rental agent for premises 1201 Columbia Road, N.W., on, to wit, May 5th 1954 or at any time whatsoever, and denies that he rented the said premises or any part thereof to the plaintiffs herein or to the husband of the adult plaintiff. This defendant admits the allegation concerning the residence of the owner of said premises, but denies that he was the rental agent for said owner.

## THIRD DEFENSE

This defendant denies that he rented the third floor of premises 1201 Columbia Road, N.W., to the adult plaintiff in this cause and her husband on the 15th day of November, 1953, or at any time whatsoever, and denies that the said adult plaintiff or her husband paid any rent for the third floor of premises 1201 Columbia Road, N.W., or any portion of said premises to this defendant.

## FOURTH DEFENSE

This defendant denies that the adult plaintiff and her husband were tenants of this defendant November 1, 1953 to and after May 5th 1954, and avers that if the said persons paid any rent for said premises, the same was not paid to this defendant, nor to any one on behalf of this defendant.

## FIFTH DEFENSE

This defendant admits, that on behalf of the agent for said premises, he cause the entire premises, 1201 Columbia Road, N.W., to be inspected by contractors for the purpose of obtaining estimates for reconditioning the entire premises, but denies that any promise was made to the adult plaintiff in this cause about any repairs and denies that any promise or promises were made to the adult plaintiff or any one in her behalf concerning repairs; and denies that any promise was made with respect to placing a lock on any door in said premises.

## SIXTH DEFENSE

This defendant denies that any agreement was made by this defendant with the adult plaintiff in this cause, and as a result avers that she could not have relied upon any agreement since no such agreement was made; this defendant reiterates his denial that the adult plaintiff in this cause, or any one in her behalf, ever paid any rent to this defendant or any one on behalf of this defendant.

## SEVENTH DEFENSE

This defendant is not sufficiently informed as to the age of the infant plaintiff in this cause and can therefore, to either admit or deny the allegations concerning same, but if same should become material, will demand strict proof thereof.

This defendant denies that the infant plaintiff was injured because of any defect in the third floor premises of premises 1201 Columbia Road, N.W., and avers that the injuries to the said infant plaintiff, if any, were cause solely by the negligence of the adult plaintiff and her husband in failing to see after and protect an infant of such alleged tender years.

## EIGHTH DEFENSE

This defendant denies that the injuries alleged to have been sustained and suffered by the infant plaintiff were cause by any negligence on the part of this defendant, but alleges that such injuries, if sustained, were the direct cause of gross negligence, carelessness and neglect on the part of the adult plaintiff and her husband, or whatever adult persons were charged with the care and maintenance of the infant plaintiff in this cause. This defendant again denies that he or any one in his behalf ever represented or agreed with the adult plaintiff that any repairs would be made to said premises, and denies that there was any violation of the District of Columbia Building Regulations.

## NINTH DEFENSE

This defendant is without sufficient information to either admit or deny the alleged injuries to the infant plaintiff in this cause, but if same should become material, will demand strict proof thereof; that defendant denies that any injuries, if any were sustained, were caused by any carelessness or negligence on the part of this defendant, but were wholly and solely the result of carelessness, gross negligence and lack of attention and supervision on the part of the parents of said infant plaintiff.

## TENTH DEFENSE

This defendant denies any and all allegations or intimations in said amended complaint of carelessness or negligence on the part of this defendant, and denies any and all allegations of any relation of

landlord and tenant by and between this defendant and the adult plaintiff and/or her husband, and denies any promise, representation or agreement with the said adult plaintiff and/or her husband with respect to repairs to said premises 1201 Columbia Road N. W., or any portion thereof, and denies that the adult defendant and/or her husband ever paid any rent to this defendant at any time for any portion of 1201 Columbia Road N. W.,

Wherefore, having fully answered the amended complaint filed herein, this defendant respectfully prays:

1. That this suit may be dismissed.

2. That this defendant may have his proper costs including a reasonable attorney's fee.

/s/ J. Franklin Wilson
Attorney for Stephen S. Madison
1020 U Street, N. W.,

[Certificate Of Service]

---

[Filed December 18, 1956]

ANSWERS TO INTERROGATORIES PROPOUNDED

Comes now Stephen S. Madison, the defendant named in the above entitled cause, and for answer to the interrogatories submitted by the plaintiff, answers them as follows:

1. No.
2. ----
3. Thomas A. Stevens, 419 Lexington Avenue, Mobile, Alabama.
4. No, not by name.
5. November 1st 1953 to November 11th 1953, Florencetta A. Barbour; from November 13th 1953 to May 15th 1954, Vaness Massey.
6. Public Investment Corporation, 1330 U Street N. W.
7. No.
8. No.

9. Public Investment Corporation, 1330 U Street N. W.

10. No.

11. Vaness Massey, the tenant in premises 1201 Columbia Road N. W., was advised that the owner planned to renovate the entire premises.

12. Contractors sent by the rental agent inspected the entire premises and submitted estimates for the work of renovation desired by the owner. This was done, to wit, during the month of March, 1954.

13. From personal investigations made of persons who resided in premises 1201 Columbia Road N. W., during the first half of 1954 and who resided in the vicinity of 1201 Columbia Road N. W., and who knew facts and conditions pertaining to the plaintiffs in this cause.

/s/ Stephen S. Madison
Defendant

[VERIFICATION]

[JURAT]

[CERTIFICATE OF SERVICE]

---

[Filed November 13, 1956]

PLAINTIFFS' PRE-TRIAL STATEMENT

The action is for personal injuries sustained by the infant plaintiff on May 5, 1954, and for expenses sustained by the mother and care rendered by her to the infant required by the injuries sustained.

The defendant Madison was the rental agent at the time of the accident for premises 1201 Columbia Road, N. W., and plaintiffs occupied and lived on the third floor of the premises. There was a porch in the rear of the third floor unit occupied by plaintiffs, and the porch was part of the premises rented to the parents of the infant plaintiff.

The infant plaintiff, then two years of age, and while on the porch, fell through certain wooden railings of the porch to the ground below, and

he sustained a skull fracture over both mid parietal areas; he remained in a semi-comatose condition until June 11, 1954. He also sustained an injury to the 6th cranial nerve, an an injury to his right leg resulting in some atrophy to the calf.

Defendant was negligent in that he maintained the porch in a defective condition in that the boards were loose, decayed and rotted, and the upright railings were loose and in a decayed condition. That defendant had notice of the condition, and he had agreed to have needed repairs made to the porch, and he had informed the adult plaintiff that he had charge of any repairs needed for the premises. That defendant permitted the defective porch to exist in violation of building regulations. Adult plaintiff was further assured by defendant that he would supply a lock with key for the rear door leading to the porch, to secure the door leading to the porch, but he failed to do so.

Stipulations requested:

1. Hospital records of Children's Hospital and x-rays to be admitted without formal proof, subject to relevancy and materiality.

2. Photographs to be admitted into evidence without formal proof.

3. Hospital bill to be admitted without formal proof, bill to be shown to defendant prior to trial.

Expenses:

Hospital bill of $300.00.

Permanent Injury:

Paresis of right eye affecting vision.

Defendant to answer interrogatories served on September 19, 1956.

/s/ Louis Ginberg
Warner Building

/s/ Fred Somkin
416-5th Street, N. W.
Attorneys for Plaintiff

[Certificate Of Mailing]

[Filed June 7, 1957]

VERDICT AND JUDGMENT

This cause having come on for hearing on the 4th day of June, 1957, before the Court and a jury of good and lawful persons of this district, to wit:

| | |
|---|---|
| Charles T. Webb | George F. Sarver |
| Theodore Shapiro | Charles G. Mansfield |
| Charles Meltzer | Ralph T. Weddingham, Jr. |
| Major Graham | John T. Harmon |
| Mrs. Edna M. Hardy | Raymond E. Bouldin |
| James W. Killough | Henry W. Sheriff |

who, after having been duly sworn to well and truly try the issues between Gerard Phillips, an infant, by his mother and next friend Mary Frances Phillips, plaintiff and Stephen S. Madison and Public Investment Corporation, defendants, and after this cause is heard and given to the jury in charge, they upon their oath say this 7th day of June, 1957, that they find the issues aforesaid in favor of the plaintiff and that the money payable to him by the defendant by reason of the premises is the sum of Twenty two thousand five hundred ($22, 500. 00) dollars

WHEREFORE, it is adjudged that said plaintiff recover of the said defendants the sum of Twenty two thousand five hundred ($22, 500. 00) dollars together with costs.

HARRY M. HULL, Clerk,

By direction of
Judge John D. Martin

By: /s/ Lloyd E. Dietrick
Deputy Clerk

---

[Filed August 26, 1957]

NOTICE OF APPEAL

Notice is hereby given this 26th day of August, 1957, that Stephen S. Madison and Public Investment Corporation hereby appeals to the United States Court of Appeals for the District of Columbia from

the judgment of this Court entered on the 7th day of June, 1957, and July 29, 1957 in favor of Gerard Phillips, an infant, etc. against said Stephen S. Madison and Public Investment Corporation, a corporation.

/s/ Robert J. Harlan
Attorney for Defendant

/s/ J. Franklin Wilson
547 Florida Avenue, N. W.
Washington 1, D. C.
ADams 2-0216

[Certificate Of Service]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

[Filed June 25, 1957]

4 MARY FRANCES PHILLIPS

was called as a witness and, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GINBERG:

Q. Give your full name, please. A. Mary Frances Phillips.

Q. Mrs. Phillips, you are going to have to talk louder than that. Will you repeat your name? A. Mary Frances Phillips.

Q. Where do you live, Mrs. Phillips? A. 730 Hamilton Street, Northwest.

Q. And who lives with you at that address? A. My husband and my five children.

Q. In November of 1953 how many children did you have? A. Five.

Q. And what is the name of the child who is here in court who was injured? A. Gerard Phillips.

5 Q. And Gerard is spelled G-e-r-a-r-d? A. That's right.

Q. How old was Gerard in May of 1954? A. Two and a half years old.

Q. Where were you living in May of 1954? A. 1201 Columbia Road, Northwest.

Q. And what part of the premises did you occupy? A. Third floor apartment.

Q. What did that apartment consist of with respect to rooms and any other thing up there? A. Living room, bedroom, kitchen and bathroom.

Q. And was there anything back of the kitchen? A. Back porch.

Q. You say back porch? A. Yes, a back porch.

Q. How did you come to know about this apartment at 1201 Columbia Road for rental purposes? A. Well, I was looking for an apartment and I saw an advertisement and a number to call. I called

that number and the lady asked me to come over. So I went to Allison Street and the woman's name was Mrs. Barber.

Q. Let me ask you this. Did the advertisement indicate to whom you were to talk or to ask,do you recall? A. No.

6 Q. What was there in the advertisement as far as any name and telephone number or address? A. As I remember, it was just a number to call.

Q. And then following that telephone conversation did you go to the Allison Street address? A. Yes, I did.

Q. And when was that, as best you can recall? A. That was about some time in November.

Q. Of what year? A. '53; as I remember it was '53.

Q. And who did you see at that time? A. Mrs. Barber's housekeeper and secretary.

Q. Did you see Mrs. Barber at all? A. Yes, later on. We had to wait for Mrs. Barber and later on that day she came.

Q. And did you have any discussion with her about the rental of the premises? A. Yes. She told us that she was renting it for $75.00 a month and we paid her a half month's rent.

Q. And up to what period of time did that half month rent cover? A. Well, when we moved in the next day the woman on the first floor, Stella Massey, told us that they had an eviction notice.

* * * * *

8 Q. When did you next have any conversation or see anyone with respect to rental of the property or payment of rent? A. As I recall, it was about a week later that Mr. Madison and a man came with him

9 there.

Q. The gentleman whom you say was Mr. Madison, he is the same Mr. Madison who is here in court today? A. Yes, he is.

Q. Where did you see Mr. Madison? A. In Mrs. Massey's apartment.

Q. Will you repeat that? A. Mrs. Massey's apartment on the first floor.

Q. At this point you say Mrs. Massey was on the first floor?

A. Yes, Mr. and Mrs. Massey lived on the first floor.

Q. Try to keep your voice up. Who lived on the second floor?

A. Inez Perry and her brother, Howard Barnes.

Q. And who occupied the third floor? A. My husband and I.

Q. And the family? A. Yes.

Q. Now, can you tell us whether the number of rooms that were occupied on the first floor and the second floor were comparable in size and arrangement to your apartment on the third floor? A. Yes. They shared the bath, however. The first floor and second floor shared the bath, but they all had bedroom, kitchen and bath and the back porch.

10 Q. And how about your apartment on the third floor? Did that have a separate bath? A. Yes, it did.

Q. Now, getting back to the time that Mr. Madison came up to the house, which you say as you recall was about a week after you had entered into the premises, what were the circumstances under which Mr. Madison came to the house, if you can tell us? A. He came because he -- we were to make arrangements about the rent. We met on the first floor in Mrs. Massey's apartment.

Q. And was Mr. Madison there at the meeting? A. Yes, he was.

Q. Can you tell us what time of the day it was? A. As I recall it was in the evening.

Q. And who was present at that meeting? A. Mr. Madison and a man that he brought with him.

Q. Do you know his name? A. No, I don't.

Q. Who else? A. Mrs. Massey and Mr. Massey, Inez Perry, and my husband.

Q. How about Mr. Barnes? Do you recall whether he was there

11 at the time? A. I don't recall whether he was or not.

Q. You can't say that he was or was not. Is that correct? A. No.

Q. Now, tell us what conversation took place at that meeting about any rental of your apartment? A. Well, when we rented it from Mrs. Barber we were paying $75 a month. Mr. Madison wanted a

hundred and fifty dollars for the entire house, so the rent was reduced to $50 for each tenant. Each of us occupied a floor, so that made each of us pay $50 a month, pay our own utilities and chip in money to take care of the heat.

Q. Now, prior to this meeting had you made any contribution to the heat or was that furnished to you? A. No. It was furnished.

Q. And by whom was it furnished? A. From Mrs. Barber, I assume, because that was the first person we rented from.

Q. Anyway, heat was furnished and you didn't have to pay for it? A. That's right.

Q. Now, was anything more said about the method of rental of the apartments? A. Mr. Madison didn't want to be bothered with col-
12 lecting rent from each tenant, so it was agreed that Mr. Massey would collect the rent and turn it over to Mr. Madison.

Q. Now, you say that Mr. Madison didn't want to be bothered. Can you tell us what, if anything, he said about that? A. I don't remember his exact words but from what I gathered it would inconvenience him somewhat to collect rent from each tenant or have that responsibility or bother, so since we were all there in the house together it was agreed that Mr. Massey would collect the rent and then turn it over to Mr. Madison or to his office.

Q. And each one was to pay $50 a month plus the utilities and contribution to the heat, was that it? A. That's right.

Q. Now, did any further conversation take place as to the condition of your apartment on the third floor at the time Mr. Madison was there? A. Yes. He came upstairs to the third floor and looked through the apartments and he also went out on the porch and he walked the entire length of the porch. His friend mentioned to him that the porch was dangerous and that he might fall through because there was a big hole in the floor, and he said at that time that he would have the porches
13 fixed and that we had nothing to worry about, because I mentioned to him how unsafe it was, and there were no locks on the door.

* * * * *

26 MR. GINBERG: Your Honor, with respect to these hospital records and the lady who brought them down, opposing counsel, Mr. Wilson, hasn't had an opportunity to go through the records. If he would stipulate that these are the official records of the Children's Hospital and made in the regular course of the hospital's business and that it is their practice to keep records of patients in the hospital, that would lay the foundation for the introduction of the records. If he wanted to object to any parts of them if I offered them in evidence on the grounds of materiality or relevancy, he could do that at a later time, just so he would stipulate as to the competency or to the fact that they are official hospital records.

THE COURT: The only thing about that is if you leave it open to objection sometimes the question is who made the entry on the record, which would not always appear on the record. How long would it take him to make up his mind whether he wants to object?

27 MR. WILSON: I haven't had an opportunity to see them, Your Honor. I couldn't tell whether there is anything in there I want to object to.

THE COURT: Suppose we take the opportunity now. I don't want to defer ruling on it. It shouldn't take very long.

MR. WILSON: There are 38 pages.

THE COURT: But 38 pages of hospital records are not very many. I have seen it done many times. Objecting to the admission is the thing I want to know about. You don't have to know every entry.

MR. WILSON: I don't object to the hospital records. I would be willing to stipulate that these are the official records of the Children's Hospital if the physician says they are.

THE COURT: Counsel, I have had this experience over many years of trial practice, which has been pretty broad, that sometimes on records of this sort there will be an objection made to who made the record, who made the entries; and therefore if you have your lady who has custody of them leave, then we are left at sea. Why don't you just put her on the stand and let her testify as to the records and then offer

them in evidence? That is the way to do it.

Thereupon --

ANN O'HARA

was called as a witness and, having been first duly sworn, was

28 examined and testified as follows:

DIRECT EXAMINATION

BY MR. GINBERG:

Q. Tell us your name, please. A. Ann O'Hara.

Q. And where are you employed? A. Children's Hospital.

Q. What is your capacity there? A. Mecical record librarian.

Q. And in answer to a subpoena--

MR. WILSON: Your Honor, I cannot hear her.

BY MR. GINBERG:

Q. Keep your voice up, please. Mr. Wilson cannot hear you.

A. My name is Ann O'Hara, medical record librarian at Children's Hospital.

Q. Do you have or did you bring down here today in answer to a subpoena certain records? A. I did. These are the records I brought.

THE COURT: Now, have you examined these records sufficiently to be able to testify as to whether or not these records were signed by the several doctors that purport to sign them and by the nurses who purport to make the nurses' entries on the records?

THE WITNESS: To my knowledge these records were on file,

29 and when I received the subpoena I pulled the record that was designated and brought it to court.

THE COURT: And they are kept in due course?

THE WITNESS: Due course of the hospital's regular business.

MR. GINBERG: May this hospital record be marked Plaintiff's No. 11 for identification?

THE COURT: Yes.

(Thereupon, the document referred to was marked Plaintiff's Exhibit No. 11 for identification.)

THE COURT: Is there any question of counsel for the defendant to be asked before the lady goes? I mean just generally about the records. She is not going to undertake to describe the various entries. Those will speak for themselves on the record.

I thought there might be some question that you would like to ask her before she leaves because I don't want to have to send for her again.

MR. WILSON: Your Honor has already asked her if those records were made by the doctors and nurses in the hospital whose duty it is to make those records, and I think that meets my objection.

THE COURT: I thought you would be interested to have that knowledge.

* * * * *

30 HAL CURTIS HOLLAND

was called as a witness and, having been first duly sworn, was examined and testified as follows:

31 DIRECT EXAMINATION

BY MR. GINBERG:

Q. State your full name, please. A. Hal Curtis Holland.

Q. And you are a physician engaged in practice in the District of Columbia? A. That's correct.

Q. Dr. Holland, where did you attend medical school? A. I graduated from Duke University School of Medicine.

Q. In what year? A. That was in 1950.

Q. And since that did you take any postgraduate work? A. I had both some premedical school and graduate work. I had a Master's degree before I went to medical school. Following medical school I received a Bachelor of Science in Medicine and Doctor of Medicine, both from Duke University, Master's degree from Stamford University.

Q. Have you specialized in any particular branch of medicine? A. I have, neurology and neurological surgery.

Q. Over what period of time have you specialized in that branch? A. Approximately two and a half years.

Q. And are you associated with any hospital? A. I am, Children's Hospital.

32 Q. In what capacity? A. As resident neurosurgeon, resident in neurological surgery.

Q. What period of time have you been resident in that capacity? A. At that hospital six months.

Q. And have you been associated with any other hospitals? A. I have. Stamford University Hospital in San Francisco, principally general surgery with some neurological surgery included, and George Washington University Hospital, as well as the Armed Forces Institute of Pathology.

* * * * *

33 A. I have examined, really, on several occasions, the last being on the 12th of April this year.

Q. And do you know when it was that you first examined him, approximately, with respect to the last time? A. Approximately 10 days prior.

Q. Have you also had occasion to examine any X-rays taken of him? A. I have.

Q. Doctor, I would like you to take the X-rays, of which you have made examination, of Gerard, and put them on the view box in sequence, or however you feel it might be best to demonstrate to the

34 jury the condition that you observed about the boy. A. This is an X-ray of the skull of the child, Gerard Phillips. This X-ray was made at the time of his admission to the hospital in 1954. Now, there is one thing I am sure that can be seen from where you are sitting, and that is this large, dark line here and a smaller line here. (indicating).

Now, these are fractures of the skull, and rather severe fractures at that. If you can see, coming along the edge here (indicating), the outside of the skull is normal and smooth up until here, and then here is a little jagged peak right here, which merely is the way a bone appears on X-ray when the bone has been broken and one piece is slightly overriding. As you can see, it overrides here.

Actually there are two fractures here, this major one and the smaller one adjacent to it. You can see that. This X-ray is taken from the side. This X-ray is taken from the front. (Indicating).

Now, you don't see it as well here and you would have to be closer, I think, to see this same thing we are seeing here, only we are looking at it from a different angle. These dark lines we see here are again this (indicating), seen from a slightly different angle. There were other X-rays taken. However --

35 Q. Pardon me, Doctor. Do you have the dates on those X-rays? A. Yes, we do. They are recorded on the X-rays themselves. This is dated--one of them is dated May 5, 1954, the other is dated April 13. I am sorry. All of the ones at the first are dated March 13.

Q. Will you look at it again, Doctor? A. I am sorry. It is May.

Q. May what? A. These were taken in May 1954.

Q. Does it show the day in May? A. That is May 5th, yes.

Q. 1954? A. That's right. These other X-rays were taken. This X-ray of the chest is routinely done to make sure there are no fractures of the ribs or anything of that sort. The roentgenologists at the time weren't able to see anything wrong, no fracture of his ribs.

Q. Doctor, with respect to the first X-ray showing the fracture of the skull, medically how would you appraise the fracture, mild, severe, or what? A. I would say it was a severe fracture. Perhaps it might be well if I say why it is severe. Now, we see a good many children who have had head injuries. At one time or another I probably see most of the emergency cases. Now, many of them have what we call

36 a linear fracture, which is nothing but a fracture in the line, it is just a little crack, a narrow crack that will run up over a portion of the skull and usually of no significance. It is only when fragments of the bone are pressed onto the brain.

THE COURT: Doctor, is that an inner as well as an outer fracture?

THE WITNESS: It involves both. Ordinarily these cracks are really no wider than, say, the thickness of your thumbnail. Notice here

that this fracture is wide. Actually this dark line, what we are seeing, is a space between the edges of the bone. In other words, it has been a crack and the edges of the bone are separated, and that's what we are looking at here (indicating).

This (indicating) is a less severe fracture, which may point out as to what I refer. This is less severe here than this one here (indicating).

Now, because of the width and also the fact that we would consider this more severe, not only from the way the X-ray looks but because we know that a force sufficient to cause a fracture of this type is more likely to cause damage to the brain itself than a simple little, narrow crack, it is obvious, of course, surgery is required.

BY MR. GINBERG:

Q. With respect to what you said about damage, in the course of
37 your examination of the child or inspection of the X-rays have you determined any evidence of damage to the child's brain? A. In my opinion, I have, yes, sir.

Q. Very well, sir. A. Perhaps if you would like me to go on to more recent X-rays--

Q. Yes, sir, please. A. Now, these x-rays were taken on April 13 of 1957. The reason that we have more X-rays of the skull here than we did before is because the patient is in a condition to stand it. There is a limit to how much moving around a very sick patient can endure. These X-rays are both of Gerard Phillips again. This (indicating) is taken from the right side of the skull, this one taken from the left. Now, here we can see this dark line again. Now considerable healing has taken place at the side of this old fracture. Maybe we can superimpose that. Now we can see that this line right here (indicating) is a remnant of this along in the widest part of the old fracture.

A considerable healing has taken place, but it has not healed yet. It still would be apparent to me if I knew nothing about the child or the X-rays, just seeing them I would be quite sure that some old injury had been there that was not yet healed.

38 Q. Doctor, where there is evidence from the date of this accident in May of '54 to this time in '57, did that medically indicate anything as to the extent of the injury or the fracture and to any effects it might have on the child? A. I certainly would think so, yes, because taking this long to heal is again a measure of what we mentioned before, that is, unusual width between the fragments of the bone. Now, here you see this smaller fracture here (indicating) can no longer be readily seen. In other words, this area in here where it seems a little whiter probably represents callus or healing of the bone whereas this which was more severe is still present. So the answer would certainly be yes to your question. Actually from the X-rays we have now this is the principal finding. There is nothing additional I think of interest to be seen on these.

Q. What could cause a fracture of the kind that was shown in the X-ray of May 1954? A. Well, nearly any severe blow with, I suppose, a blunt object. The reason I say a blunt object is because while Gerard apparently, according to his record, suffered a small cut on his head it was not over the point of the fracture. If it were a sharp instrument you would expect to find the scalp severely lacerated, perhaps with bone exposed. So I would say a severe blow by something blunt. Now, this could be either say a blow directly to the skull or say a blow to the

39 individual throwing him perhaps through the air and landing on his head. I have seen such fractures following things of that type, in other words, an abrupt contact with something solid whether the object be moving or stationary.

Q. Would a fall by a child two years old, as in Gerard's case, from a porch and his head striking the ground be consistent with a fracture of this type? A. Oh, certainly.

Q. Now, Doctor, you have indicated about brain damage. Will you expand on that as to the boy with respect to the effects that a fracture of this kind and damage to the brain could have on the child and whatever the future might hold for him or someone who has received an injury to the extent that he has and at his age? A. Could I ask a

question. Now, would you like me to discuss the possibility in general terms or specific?

* * * * *

40 Q. Doctor, can you state with any reasonable degree of certainty
41 as to what will probably be the aftermath of an injury of this kind?

A. Following an injury of this kind -- I should add one point -- following an injury of this kind where the patient is known to have been in a coma in the neighborhood of a week. The reason I mention this is the length of the coma is of significance in predicting what may happen or what may very probably happen.

Now, this boy was noted in the hospital records to be in a coma for approximately one week and then began to gradually wake up and become more aware of his surroundings. Following a head injury of this type there are several possibilities and even probabilities that may appear. The first and most dramatic of course would be appearance of convulsions.

Now, the longer a person is unconscious following a head injury the more likely he is to develop convulsions or seizures at some later time in his life even though he may never have had them before. I speak principally now of people who have never had convulsions before.

Now, when I said convulsions I also said the word seizures because the most common thing that a person may think of with convulsions is someone who will fall on the floor and lose consciousness and perhaps have violent movements of their arms and legs.

THE COURT: In other words, it would be rather in the field of
42 epilepsy?

THE WITNESS: Yes, sir, that is what is commonly meant by epilepsy. There are other less common seizures but still very well known to people in my specialty, seizures that may involve behavior. This has been seen very frequently in injuries reported in the Army. Now, that stands to reason that a person who is unconscious longer than another person is going to be more likely to have convulsions because those whose brains are damaged seriously are more likely to

have convulsions. He is in a coma because his brain is severely damaged. The longer he is in a coma the more severe the damage and hence the more likelihood of convulsions.

Now, there have been very few mass studies on civilians. There are a great many on military injuries, but these are generally of a different type, in other words, more bullet injuries, things of that sort.

Now, there is one reference -- may I refer to that?

BY MR. GINBERG:

Q. If you will, Doctor. A. This is a reference which is by, interestingly enough, a man named Phillips, G. Phillips, a prominent neurosurgeon in England, who has made a study and a prolonged follow-up of so-called closed head injury. That is what we are dealing with. An open head injury is one where the brain can be seen protruding, or portions of the membrane over the brain. He has shown conclusively
43 what most of us knew to be true before, but he has put it in figures. Now, he feels and has shown as a result of his studies that in a thousand cases that he has followed for as long as 20 years following the head injuries, of the cases that he mentions with post-traumatic amnesia -- amnesia in his terminology refers to any condition in which you are not aware of your surroundings, hence coma or even being more alert -- anyone who has had amnesia for over 24 hours, 11 1/2 percent of these patients develop seizures, which includes convulsions or epileptic attacks, within two to three years following their injury. However, we also know that the longer the coma the longer it will be before the convulsions appear. The reason for this is that what causes convulsions in the brain is the formation of the scar. In other words, the scar on the brain is one of the causes of epileptic attacks or seizures.

Now, the structure of the brain is of course different than any place else in the body, and any sort of reparative process or healing process takes much longer in the brain than anywhere else, and of course again the more severe the injury the longer it is going to take to heal.

Hence we can say -- I can say on the basis of my experience and on the basis of what has been shown and accepted in medical literature that the likelihood or possibility or probability of seizures appearing following a closed head injury associated with prolonged unconsciousness
44 of seven days or over is likely to have an onset of convulsive attacks or seizures of at least 11 1/2 percent of all cases.

This boy has a normal brain wave test, a normal electro-encephalogram. It surprises many of my patients to learn that while they may actually be having epilepsy attacks from time to time and are under treatment by me for those attacks that their brain wave test may be perfectly normal.

In other words, the trouble may be actually the brain wave test records only from those portions of the brain that are near the surface. Some of the trouble which may be deep in the brain may not be able to be diagnosed with the electroencephalogram, which would be normal.

This is also borne out by Dr. Phillips' studies in which a third of all of his cases who did develop seizures after a head injury had a normal electroencephalogram, they had a perfectly normal test with the encephalogram even during the period while they were having convulsions.

Other possibilities or probabilities following head injuries bearing somewhat on the seizures are as I mentioned. The most common type of seizure is the type with the jerking of the arms and legs that we all know about. Other types may involve what we may term as automatic behavior. By automatic behavior, this is acting almost like a machine. It occurs principally as a result of injury on this portion of
45 the brain laying approximately under my hand, the temple lobe. You will remember that the fracture line on the X-rays ran down almost to the level of the ear which is in the region of the temple lobe. These seizures are of a peculiar type. They are called psycho-motor seizures, and in this I can give an example.

A person may suddenly have one of these attacks come upon him. He will no longer be aware of his surroundings, his eyes may be described as a little glassy by people around him. They may not see a

great deal in addition, but what he does is of interest. He may start out to perform some task such as driving his car or start to cook something, any act, and may carry it out quite well. An observer may not be aware of what is actually happening unless specially trained for certain things that we watch for.

Now, if the person is thwarted in this by someone who knows what is happening and attempts to stop them from driving the car they may respond with a violent rage. It is a completely unreasonable thing. This is called sham rage. In other words, it is a rage but there really was nothing to provoke it. This is just as much a type of seizure as a person who falls down.

Now, the incidents of this type of seizure are included in the 11 1/2 percent.

46 Now, the reason that I dwell on this so much is that in Gerard's behavior with some difficulty from his mother I was able to get some history because here again, as I mentioned, an observer who is not technically trained may not realize what he is seeing. He may think it is just bad behavior on the part of a child. In an adult it would be considered in more serious light perhaps.

Well, Gerard Phillips has exhibited episodes of extreme rage when he is thwarted in whatever he was doing. Now, it is difficult to say and be absolutely sure that these are attacks, that these are a type of seizure. But if he is to be under my treatment, say, I would feel convinced about enough to prescribe medicine in an attempt to prevent further occurrences of it. In other words, I feel that these are seizures. There may be all types of maladjustment and this may manifest itself in many ways.

Now, the way in which I think that it has manifested itself in Gerard's case is not terribly unusual. It may sound something like some of your own children, perhaps, or like mine, but there is a feature or two of it that I'd like to point out.

Now, for reasons that I don't entirely understand, it was necessary for an older brother to be sent to some place else to live following

Gerard's return home from the hospital. Now, this is a particularly susceptible time during the immediate convalescent period following a
47 head injury for difficulties in behavior of adjustment to set in. Now, this child who is slightly older, as I understand it, and was the patient's playmate, was taken away for a while. While he was gone the patient created an imaginary playmate. We all know children have imaginary playmates, but the significant point is that when the child returned or was returned to the home the patient was unable to re-establish his relationship with his brother before and continued to play with the imaginary playmate. This again might not sound too abnormal, but the thing is that the child has withdrawn from contact with other children. He either seems unable to understand or unable to take part in their games because he just doesn't seem to get along too well.

It is not a matter of being violent or anything of that sort, but he just doesn't mix well. He is different. His play is principally involved in tying chairs or anything else to the doorknob with bits of string or belts or anything he can find.

Now, this in itself doesn't mean too much, but the thing is this is one of the principal things this child does. He doesn't seem too interested in television, which is again unusual.

Q. You associate those factors with his condition? A. Yes, I do.
48 Each of these little things by themselves in an individual child would not mean too much, but altogether in a child known to have suffered severe head injury it becomes significant, and perhaps the most concrete evidence of damage to the brain in terms of something that we all know about is that we know that children are ordinarily toilet trained between two, three and four years of age. Well, Gerard was completely toilet trained, which is a function of the brain. A child becomes toilet trained when his brain is able to tell various portions of his body to behave in the fashion that he wants them to.

Well, following his injury he was completely toilet trained. This was noted in the chart, I believe, when he came in to have baby shots or something. But in any case he was toilet trained. Following his

injury it was necessary for him to wear a diaper for a while. This is now a five and a half or six year old child, and still at times now Gerard, nearly three years later, still wets the bed. I have forgotten the exact figure. I think it was say half a dozen times a month. This is again by itself not too significant, but tied up with all these other things, plus the fact that we found evidence of slight weakness of his right leg with a little increase in tonus, in other words, we can feel increased tension in the muscles. It is not marked, but it is there. He was noted to be almost paralyzed in that extremity.

49 Q. Will you keep your voice up? A. He was noted to be almost paralyzed in that extremity in that leg at the time of his injury. We can still see a mild residual but I would not be concerned in his care about that as I would about the generalized brain damage involving his behavior.

Q. With respect to his leg, Doctor, in your opinion did that weakness in his right leg develop as a result of this head injury? A. Yes, in my opinion.

Q. And has that improved in time? A. It has improved with time but it still is possible for it to reoccur.

Q. What is your thought about whether or not he will get a recovery from the leg? A. I think over a period of time that he will recover almost completely. He has almost completely recovered in so far as the leg is concerned. But, as I say, in my opinion the leg is not the principal problem. It is the behavior and the evidence of generalized brain damage. This boy is young and it is difficult to say just what his intellectual capacity is going to be.

Q. Where there is a head injury in a small child is it your experience that if the injury is sufficiently deep that it will set the child

50 back in his training, for instance, these matters you have discussed about wearing the diaper and other things? A. Oh, yes, yes indeed, that is one of the signs. As a matter of fact, those of us who have had aging relatives who have had strokes know that they, too, lose control of their bowels and bladder frequently following a stroke as a result of the brain injury.

Q. Are those signs indicative of the extent of the injury? A. Putting all of them together, yes.

Q. Doctor, from your examination and a reading of the history of the case can you tell us anything about any eye injury he may have incurred? A. Yes. There was at the time of his admission -- I must confess I am unable to recall which eye it was that was involved.

Q. Would the record help you, sir? A. Yes, it would. At the time of his admission to the hospital with his head injury he was noted to have paralysis -- it is the right -- of one of the nerves that supply the right eyeball. Now, there are a number of rather complicated systems of muscles around the eye that move it in all its various directions, and there are several nerves that run from the brain to the muscles so that they respond to your command, so to speak, to look
51 this way or look that way.

Now, there was paralysis of what we call the sixth cranial nerve, the sixth nerve supplying the right eye. This manifests itself in deviation of the eye inward. In other words, this nerve supplies the muscle which pulls the eye out this way (indicating) when you wish to look to one side. He was unable to do that.

Now, this is unquestionable evidence of damage to the nervous system, and I might say it is one of the key signs that we look for in diagnosing damage to the nervous system. If a patient is brought into the emergency room in a nervous condition this is one of the first -- actually if you see a neurosurgeon examine a patient the first thing he will look at is the eyes, and this is what he is looking for, the paralysis of this nerve. So, in other words, the eye was turned in.

Q. Would you say with reasonable certainty, sir, that that condition of paralysis was a result of the head injury? A. I think we can be sure that it was.

Q. Has that cleared up to any extent, Doctor? A. It has cleared up to the point where it is not visible to the naked eye. By that I mean to have the patient move his eyes around in various angles to see if he can do this. It is not possible to notice any difficulty there. I mean he

52 has recovered to that extent. However, he has had some occasional frontal headaches, headaches in the front of his head, and he does not watch television, which is for most children unusual, for any prolonged period of time. His span of attention is short. These are one of the signs of, again, brain injury or difficulty in vision, one may result from the other. So we have attempted to examine this child with the specific instruments that a specialist uses, and because of the child's age and partly because I think of his behavior problems it was impossible to arrive at a specific diagnosis, but I feel that he does have some visual difficulty, something wrong with his eyes, which could be -- well, the greatest probability would be that it would be resulting from this. It takes a long, long time for one of these paralyses to clear up.

Q. Doctor, looking toward the future, in your opinion would Gerard need treatment as he grows older, or what should be done for him? A. I think that he does need treatment. He should be followed by, really, several specialists. He should be watched by a neurologist and neurosurgeon to watch for the occurrence of, say, more serious seizures or more serious attacks if these attacks are really what I think they are. He should be watched from that point of view. He should have

53 some I. Q. testing, and so on, to see how severely his mentality has been impaired and what sort of educational plans can be made for him in the future. I have little doubt but what a special school will be required for Gerard. I am just not able to see how he could carry in school with the circumstances the way they are right now, let alone what happens in the future.

Q. You mean with the average group of children? A. Yes, sir. As I say, I am not sure about the intellect. That is not my specialty to run tests of that type.

Q. Over what period of years should these examinations be given to him? A. Until he is completely adjusted to his surroundings. It is difficult to say, really, to know how much he can be improved.

Q. As long as there is any question about it, then, he should be--

A. He should be seen at intervals by a doctor, a specialist.

Q. That would carry him right through to adolescence, to early manhood? A. Yes because I think it is worthy of note that the onset of epileptic seizures following a head injury -- they have been reported as not having showed up for as long as 20 years after a head injury. Remember, the healing of the brain is a long involved process and the for-

54 mation of the scar takes a long time.

MR. GINBERG: I have no further questions.

* * * * *

CROSS-EXAMINATION

BY MR. WILSON:

Q. Doctor, I believe you said you had been in this specialty about two and a half years? A. That is correct.

Q. And you have been at Children's Hospital for six months? A. That is correct.

Q. And you said this boy, Gerard Phillips, didn't watch television over a long period of time. Where did you see him watch television? A. I haven't seen him watch television, counsel. The information--

Q. You don't know that of your own knowledge, then, that he doesn't watch television? A. No. I think I do know that of my own knowledge for this reason. I see what you mean, that you feel this is something that has been told to me and whether I accept this or not. Well, viewed from my point of view I think I do know it because the questions that I had asked maybe persons in the courtroom could ask themselves, if they would think that whether a child watched television

55 for any prolonged period of time really would have much to do with a head injury. In other words, the information that I was asking for from the boy's mother was the sort of information that she would have no knowledge of its possible significance. This is true of many of these things.

For example -- well, let's say, for example, tying things to the doorknob. This was mentioned by his mother in a more or less joking

manner.

Q. But you didn't see that yourself? A. No, I did not.

Q. And you of your own knowledge--

THE COURT: To save a little time -- of course I see what you mean, that you don't want hearsay in the record, but the situation is that this witness was put on the stand before the mother had concluded hers, as we always do to accommodate doctors. Now, we could let it in conditioned on his mother testifying to certain things the doctor assumes. Then it would tie in with the doctor's opinion.

MR. WILSON: My objection was, Your Honor, that Dr. Holland is drawing his conclusion from something somebody else told him, that he hasn't observed himself.

THE COURT: I think I am meeting your objection, that if she testifies that the little boy doesn't watch television or that he does these other things the doctor has testified, then he could be giving an

56 expert opinion on what that would signify. You see, it wouldn't rest upon hearsay; it would rest on evidence in the record.

MR. WILSON: But up to this time it is resting on hearsay.

THE COURT: We interrupted the course of the proceedings. Now, if the plaintiff's mother, the little boy's mother, doesn't testify to these things that the doctor has drawn conclusions on, then I would sustain the objection on the ground that it is hearsay because it would not be in the category of a statement made by the patient to his physician. It couldn't be because the little boy is not in position to make a statement to the physician.

MR. WILSON: I wouldn't feel badly about it if the mother had not heard the doctor's testimony.

THE COURT: I am sorry about that, but you didn't object to the doctor going on out of turn. We do that all the time.

MR. WILSON: I didn't object to that because that is common practice.

THE WITNESS: Could I say something, Your Honor?

THE COURT: Yes.

THE WITNESS: I might say that legal things I really don't understand much about, but you see, as far as evaluating what a patient tells us, most of the things that we are watching for in this specialty are things
57 that the average person who is trained in some other non-medical field would not pay much attention to. I mentioned that most of these little things by themselves would mean very little.

THE COURT: That is not the point.

THE WITNESS: But what I am getting at --

THE COURT: I know, but I would rather you wouldn't get at it. I think you have gone fully enough. I want to confine it to the situation, that is, that the doctor is permitted to give an expert opinion on the assumption that the facts which he has related are true about the little boy plaintiff, and I take it that you are going to offer the boy's mother as a witness again, her testimony having been interrupted.

MR. GINBERG: I would like to ask the doctor what part of his testimony is based on the history of it that he may have gotten from the boy.

MR. WILSON: The boy himself?

MR. GINBERG: Yes.

THE COURT: I don't know that he could answer that. I think that is pretty broad.

MR. GINBERG: May I ask the doctor?

THE COURT: How much of the history did you get from the boy, can you tell us?

THE WITNESS: I did. I don't believe his mother was aware at the
58 time when I found on talking to the little boy that he did have headaches. I do not believe his mother was aware of this.

THE COURT: That was your observation of the boy?

THE WITNESS: Yes.

THE COURT: Not history?

THE WITNESS: That is correct. This is asking the boy directly.

THE COURT: We are speaking about history, and it is competent for you to base your statement on what the patient tells you. Pain is

subjective. You can't see the pain. But with this little boy I must assume he wouldn't be able to make much of a description of his situation.

So you understand the ruling, I think, both of you, that I am letting this go in, that part of it that we are relating to now, on condition only that the mother testify to these facts on which the doctor observes as an expert. You see, you progressed in a very different way from the usual form, but what you have actually been doing is asking hypothetical questions broken down. In other words, you have asked the doctor to assume certain things which have to come from the mother's testimony.

MR. GINBERG: I want to ask the doctor--

THE COURT: And then he could give his opinion on the basis hypothetically of certain facts, but the mother cannot state to him certain

59 symptoms and let it come under the rule of patient saying so-and-so, because that is hearsay, you see.

MR. GINBERG: Doctor, how much of this opinion, if you are able to tell us, was based on information obtained from the boy as well as examination of the boy himself?

THE COURT: How is he going to separate that? I don't see how he is going to separate that, counsel.

MR. GINBERG: Can you do that, Doctor?

THE WITNESS: I can't do it very well. There are certain things that I was able to find as a result strictly of examination. If we were to limit our conclusions we would miss most of this boy's clinical picture.

MR. GINBERG: But whatever your opinions are they are based on what the mother has told you as well as the boy and your examination?

THE WITNESS: That is correct, as in the case of any patient.

THE COURT: Yes, that is true. He was asking you a hypothetical question you assume such and such and what would be your opinion. I am not critical of that approach, but I think it caused some confusion in counsel's mind, that your testimony has to be based on the assumption of the facts that the boy's mother would testify to.

* * * * *

62 BY MR. WILSON:

Q. I believe you testified, Doctor, that his right eye is in fairly good shape now. A. No, I don't believe I said exactly that. I said that I had reason to believe that he was having difficulty with his vision. Now, since I know from the hospital record, accepted in evidence, that his eye was paralyzed and since I know that customarily following such injuries the patient may have visual difficulties over a long period of time when nothing can really be seen without the use of special instruments, we cannot say whether his eyes are in good shape or not until he is old enough or in good enough condition to be adequately examined by a specialist in eyes.

Q. That is just not your field, the eyes? A. No.

Q. And you don't know that he has been examined by a specialist?

63 A. Pardon?

Q. You don't know whether or not he has been examined by a specialist, do you? A. Yes, I do. You mean recently?

Q. Yes. A. Yes, I do. He was seen -- there are notes in the hospital chart where he was seen by an opthalmologist. An optometrist is trained in fitting. An ophthalmologist is trained in fitting and also surgery and other diagnoses. He was seen, I am quite sure, by an ophthalmologist at the time of the injury, Dr. Robert Day, who wrote his impression was paralysis of the sixth cranial nerve on the right.

Q. That was in 1954? A. That is correct, and he was seen in the eye clinic at Children's Hospital. An attempt was made to examine him, but since no findings were possible -- I mean it was not possible to get enough cooperation from the child. He did his best but it was just not good enough to cooperate to the extent to tell which way the letters go and that sort of thing, for the ophthalmologist to be able to draw any conclusions at all.

He said he had no opinion and no conclusions except that he did feel that the child should be checked again at some later date to make sure.

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65 MARY FRANCES PHILLIPS

DIRECT EXAMINATION (Cont.)

* * *

BY MR. GINBERG:

Q. Mrs. Phillips, what can you tell us about Gerard watching the television? Does he do that? A. Well, he doesn't watch television for very long. I can't keep him interested in any program for very long.

Q. Have you made any efforts to have him watch the television along with the other children? A. Yes, I have. There is a morning kindergarten program that comes on television, and since he doesn't go to school I thought it would be good for him to watch that, but I can't get him interested in it.

Q. How about other programs? Have you made any effort to have him watch other programs? A. Yes. All of the children usually

66 would sit down to watch television but he wouldn't stay interested very long. He'd get up and wander about the house or do something else.

Q. Now, what can you tell us about him being toilet trained prior to the accident and what has happened since? A. Yes, he was. He was very trained and he was completely trained before he fell, and after he fell, immediately on coming home from the hospital, he had to wear diapers and of course his bed had to be changed frequently. And even now he wets the bed sometimes, maybe two or three times a week.

Q. And that still continues? A. Yes, it does.

Q. Do you have a child named Reggy? A. Yes, I do.

Q. And how old is Reggy? A. Reggy, he will be four years old in July.

Q. And what circumstances were there involved with Reggy going away from the house and then returning as far as Gerard was concerned? A. Well, my sister-in-law came from West Virginia after we notified her about the fall, told us that they didn't expect Gerard to live, and Reggy was a baby at the time. He was about eight months old, I'd say.

67 Q. Keep your voice up. A. And I was expecting another baby at that time, and of course the seriousness of Gerard's accident made it necessary for -- she pointed out to me that it would be a great help to

me if she took Reggy to West Virginia to help me out because I had to give Gerard special care when he came home; and he had whooping cough and he was a young baby. Of course I wasn't too well myself and it was extra work for me, so she took Reggy to West Virginia with her.

Q. What was the relationship between Reggy and Gerard prior to Reggy's leaving Washington? A. Well, of course Reggy being the baby and Gerard next, they were very close, and the first thing Gerard wanted to know when he came home was where was Reggy, and he searched all through the house for him; and even long after that, many months after that, he would wake up at night and talk to him and play with him even though he wasn't there, and all times of the night we could wake up and find him up playing with his toys and talking to Reggy.

Q. Now, did Reggy come back to live with you? A. No. He is still with my sister-in-law, but she moved here to Washington where they could be together and where they could visit often. The only reason he is not home with us is because we haven't had enough beds and room space for him just yet, but we are going to take care of that.

68 Q. Now, can you tell us about the experience that you have observed where Reggy has been in a house that Gerard has also been with him? Has Gerard made any comments about Reggy? A. Yes. Even now he speaks of him all the time, every day, and he dearly loves him, but even though he is there sometimes it is not real to him.

Q. You say even when he is there? A. When Gerard is with Reggy it doesn't seem quite real to him at times, even though they play together and he talks of him all the time even now.

Q. On what do you base this lack of reality? A. From what Dr. Holland told me at the time.

Q. I mean from what you observe, where the two children are together? A. You mean his not realizing that this is actually Reggy?

Q. Yes. What can you tell us about that? A. Well, when they are there he just doesn't seem to believe, although he talks to him, calls his name that Reggy is actually with him or that this is actually his

brother. He doesn't seem to realize that this is actually the brother that was there at the time. Of course he was very young then and Reggy was a baby.

Q. What causes you to say that there is a lack of realization?

69 A. Well, the way his eyes look, the far-off expression in his eyes, and his voice and the way he plays.

Q. You sense a lack of recognition of his brother? A. Yes, I do.

Q. What about the matter pertaining to a string on the door? A. Well, he ties everything, ropes, strings, belts, anything he can get, he ties the chairs together, the doors together, the chairs and doors. He ties everything up.

Q. Well now, how would you compare his conduct with what you have observed about other children his age doing similar things? A. Well, of course I have six of my own and I have never had any of them to do exactly that, or to go to that extent,so I wouldn't think it was a normal action, really.

THE COURT: There is one important thing I would like to ask about, and that is about observing his bursts of anger or emotional actions. Would you describe that?

THE WITNESS: Yes. My children are usually well disciplined, and if I speak to them I have never had trouble with my children obeying me or talking back to me or giving me any argument. But with Gerard it is different. He goes into a rage, screams and jumps up and down, which I have never tolerated or have never had that happen with any of my other children, and even now he does that. If there's some-

70 thing he wants to do or something he wants to play with and he can't do it, he will just go into -- just scream and jump up and down, run through the house or tear things down or throw books or things like that, that I have never had my children to do.

BY MR. GINBERG:

Q. Have you observed any difference between his conduct with respect to outbursts prior to the accident and after? A. No.

Q. What I am trying to do is determine whether or not there is any difference in his conduct between before and after. A. Yes, there is a difference. I never had that trouble, although he was small, before the accident. He never went into rages. Even when he did, as children will do when he got angry, he never went into a rage, he never jumped and screamed and cried and kicked like he does now.

Q. When did you observe this difference in his conduct with respect to the time of his accident and the time he came home from the hospital? A. Of course when he first came home he was weak for quite a while and he was unable to walk and we had to carry him around; but I would say about a couple of months after he came home, and then it gradually got worse because now I have noticed even in the last month

71 or so it has gotten worse; and to me, of course, being close to him, he doesn't even look good around the eyes. I have noticed that the older he gets the more pronounced this thing is.

Q. You say he has gotten worse? A. Well, he goes into these fits of anger more often and each time they are more violent.

Q. Now, when he doesn't have one of these seizures or episodes, or however they may be described, is his conduct then comparable to what it was before the accident? A. Yes. He is usually quite calm and affable and easy to get along with.

MR. GINBERG: I think I have covered all that I recall.

THE COURT: I think, counsel, that makes the doctor's testimony as an expert competent on his opinion because this witness has testified to the facts on which he based his opinion, that is, the observations, the things that his mother noticed about the little boy. I think it is competent.

* * * * *

82 CROSS-EXAMINATION

BY MR. WILSON:

Q. Mrs. Phillips, I believe you testified that your first visit to 1201 Columbia Road was after you made a telephone call to a Mrs. Barber and you fixed that date, I believe, as November 1953. Is that correct? A. My first visit you say?

Q. Yes. A. Yes.

Q. When you first went to 1201 Columbia Road. A. I went there before I made the phone call and I didn't go in, however.

Q. And then you went to some other place where you saw -- what was this address? A. It was Allison Street.

83 Q. And you saw this Mrs. Barber? A. Yes, I did.

Q. And you made your arrangements with Mrs. Barber? A. That's right.

Q. And then how soon after that did you move in premises 1201 Columbia Road? A. It was the next day or probably the day after.

Q. I believe you testified that when you moved in there was an eviction notice tacked on the door, on the wall? Is that correct? A. Yes, on Mrs. Massey's door.

Q. And how soon after you moved there did Mrs. Massey leave the premises? A. Oh, that wasn't until spring.

Q. I don't mean Mrs. Massey. I mean Mrs. Barber. How long did Mrs. Barber stay at 1201 Columbia Road after you lived there? A. She wasn't living there when I moved there. She was living on Allison Street when I moved there.

Q. And was anyone living there who was representing her? A. No.

Q. Didn't you testify yesterday that she had a secretary or somebody? A. That was in her home on Allison Street.

84 Q. Not in these premises? A. No.

Q. She had no one on these premises acting in her behalf? A. No.

Q. And did you see her after you moved there? A. Yes, I did.

Q. How long after you moved there did you see Mrs. Barber? A. It was the next day after I moved there.

Q. And did you see her any more while you lived there? A. No, I don't recall seeing her any more, not while I was living there.

Q. Did you see her after you left there? A. Yes, I did.

Q. How long after? A. Oh, that was several years. I saw her

at Children's Hospital but it had nothing to do in connection with the rent.

Q. And who was living in 1201 Columbia Road when you moved there? A. Mr. and Mrs. Vanness Massey were on the first floor, and there were some people that I never knew on the second floor who moved out the next day.

Q. And I believe you testified you paid Mrs. Barber one half month's rent? A. That's right.

85 Q. And you never paid her any more rent? A. No.

Q. Did she make any effort to collect any more rent from you while you lived there? A. Yes, she came there to collect the rent.

Q. How long after you moved there was that? A. That was the next day after I moved there.

Q. But you didn't pay her any more? A. She wouldn't accept it.

Q. She came there to collect it and then wouldn't accept it? A. That's right.

Q. Did she give you any reason for not accepting it? A. She did.

Q. And when do you fix the time when you say you saw Mr. Madison and another man who came with him at 1201 Columbia Road, Northwest? A. Well, it was about a week or a few days after Mrs. Barber's visit.

Q. You didn't know the man who came with him, did you? A. No, I didn't.

Q. And did Mr. Madison talk to the people who were living in 1201 Columbia Road at that time? A. Yes, he did.

86 Q. What part of the building did he talk with them in? A. On the first floor in Mrs. Massey's apartment and then after that he came to our apartment on the third floor.

Q. How long after that? A. After this meeting that we had that night.

Q. That is on the same day? A. Yes, it was the same day.

Q. What time of day or night was this? A. It was in the evening. I don't know the exact time but it was in the evening.

Q. And wasn't Mr. Madison trying to get the people to move out when he came there so he could have the place painted and papered? A. No.

Q. Did he state that is what he came there for? A. No, not on his first visit. No, he did not.

Q. How many children did you say you had living there with you at the time? A. I had five.

Q. And do you know their names and ages at that time? A. Yes.

Q. Could you give them to us, please? A. My oldest child was David Conrad and he was about seven years old at that time. Gene was about five.

Q. Gene? A. G-e-n-e, Gene about five.

87 Q. Is that a boy or a girl? A. Boy, and Cathy was about four.

Q. How do you spell the first name? A. C-a-t-h-y. And Gerard was about two and a half, and Reggie was about eight or nine months old.

Q. As a matter of fact, when Mr. Madison came there did you tell him you would like to stay because it was awful hard for a person with five children to get anywhere to go? A. On his first visit no, we didn't talk about moving at all.

Q. Did you ever tell him it was awful hard for a person with five children to find a place to live? A. I might have.

Q. Did you? A. I might have. I can't recall exactly but it wasn't at that time. I am sure of that because nothing was mentioned about moving on his first visit.

Q. How long did Mr. Madison and this other man stay there?

MR. GINBERG: Which occasion?

MR. WILSON: First occasion, 1201 Columbia Road.

THE WITNESS: Well, I don't know exactly but I should say about an hour or more.

88 BY MR. WILSON:

Q. An hour? A. Yes.

Q. And you said Mr. Madison came there on the second occasion? A. Yes.

Q. And when was that? A. Well, it was before Christmas I know. It wasn't long after that he came when he promised to.

Q. How many times did he come? A. He came three times.

Q. Three times altogether? A. Yes.

Q. You spoke of there being a slide bolt on the back door leading to the porch on yesterday, did you not? A. Yes, I did.

Q. And that was the third floor of this building, wasn't it? A. Yes.

Q. And nobody could come in that rear, could they? Could anyone get up to the rear? A. No, unless they used a ladder.

Q. And there was no reason for a lock on that door to keep anyone from coming in, was there? A. Not from coming in but from going in there should have been a lock.

89 Q. Were you employed during November and December 1953? A. No.

Q. You didn't work at all during that time? A. No.

Q. Were you at home all the time or were you away a good bit? A. I was going to school for a while.

Q. What school were you attending? A. Martha Washington.

Q. And what were your hours at school? A. From, I think it was, seven o'clock until nine-thirty or ten o'clock, something like that.

MR. GINBERG: Morning or evening?

THE WITNESS: Evening.

BY MR. WILSON:

Q. Evening? A. That's right.

Q. How many nights a week did you go to school? A. Three.

Q. And when you were away attending school who saw after the children? A. My brother-in-law lived there for a while. He was there all the time. My husband worked at night. Or I'd ask Mr. Barnes on the second floor or my sister.

90 Q. During what period did your brother-in-law live at 1201 Columbia Road?

MR. GINBERG: Just a minute. I am going to object to this, if

Your Honor please, because it is outside the scope of the time of the injury. I think that would be the only question of relevancy.

THE COURT: I think it is harmless to let counsel develop the general situation about the care of the little boy. That is what is involved.

Please read the question.

(The question was read by the reporter.)

THE WITNESS: From sometime in February until about April.

BY MR. WILSON:

Q. What year? A. It was '54.

Q. He didn't come there then until more than a month after Christmas of '53 after you moved there? A. It was after Christmas.

Q. When did you start to school? A. It was in February, I think.

Q. February 54? A. Yes.

Q. The first three months you were up there, two or three months, you didn't attend school? A. No, I didn't.

91 Q. I believe you testified yesterday that the porch, and so forth, was in a dangerous condition? A. Yes.

Q. When did you first find that out? A. When I moved there, looked the place over then.

Q. You knew it then? A. Yes.

Q. Do you remember what day of the week it was when you claim your son Gerard was injured? A. I am not sure but it was probably on a Wednesday. I remember that because my husband got paid on Wednesday, and I think that was his pay day.

Q. And approximately what time of day was it, if you know, when your son was injured? A. Oh, it was probably after two o'clock, sometime in the afternoon. I am not sure about the time.

Q. Do you know what your actions were that afternoon before you heard of his injury? A. Yes, I do.

Q. Do you know what you had done that afternoon? A. Yes.

Q. What had you done? A. I had been downtown shopping and stopped at the hairdresser's.

92 Q. Do you know what time you left downtown? A. Oh, I don't know exactly what time I left, no, because after I finished shopping I went by the hairdresser's, which was on 11th Street.

Q. Do you know what time you left the hairdresser's? A. No, it was in the afternoon around two, something like that.

Q. And do you know what time you got home? A. No, I don't. I can't be sure of the time because I don't have a watch and I knew I left my husband there with my children when I left that morning so I didn't feel any need to rush.

Q. What time did you leave in the morning? A. About ten o'clock.

Q. Ten o'clock? A. About that time.

Q. And I believe you said just now your husband worked at night? A. He did.

Q. What time did he go to work? A. Ten-thirty at night. That's the time he left home.

Q. On the day you claimed that your son was injured where were you when you got the news? A. I was at my brother-in-law's house about a block and a half from where we lived.

93 Q. And how long had you been at your brother-in-law's house when you got the message? A. I hadn't been there -- from the time it took me to get from my house to his house, and I hadn't been there over five minutes. The whole thing took no more than 10 or 15 minutes.

Q. You walked a block and a half and hadn't been there more than five minutes before you got the news your son had been injured? A. I hadn't been there very long. I can't say minutes by the clock. It was only a short while.

Q. How long after you got the message did you get back home? A. That didn't take very long even by the clock because I ran all the way.

Q. When you got there did you see Gerard? A. No, I didn't.

Q. How did you find out that something had happened to him? A. Mr. Barnes and Mrs. Massey -- when I first found out my son came to my brother-in-law's house and told my husband and I that Gerard had fallen and when we got to the house they told us they had called the

ambulance and had him taken to the hospital.

Q. When you got home the ambulance had been there and had
94 taken the child to the hospital? A. That's right.

Q. And you hadn't been away over a very few minutes? A. That's right.

Q. And you didn't see the child until you saw him in the hospital? A. That's right.

Q. How many of the other four children were at home at the time Gerard was injured? A. All of them were there.

Q. Who else was there in your apartment besides the five children? A. Well, there were three other children, the children from the second floor and a visiting child from across the street.

Q. And how old would you say the eldest of those three or four children was? A. About ten years old.

Q. When you got home from the beauty parlor, Mrs. Phillips, how long did you stay at home on this day you say your son was injured? A. I wasn't there very long because I asked the children where was the father and they told me that the father had told them that he had to go out for a few minutes.

Q. And when you got home from the beauty parlor there was no
95 one there but these children and the visiting children? A. Yes.

Q. You didn't see nor hear the ambulance at all, did you? A. No, I didn't.

Q. What is your husband's occupation? A. His occupation now?

Q. What was his occupation then? A. He was working for Capital Transit.

Q. Did he used to do plastering work? A. He did painting.

Q. Painting? A. Yes.

Q. When Mr. Madison gave him -- did Mr. Madison give your husband a card, his business card, and tell him that he might have painting or plastering to be done? A. I couldn't say.

Q. Wasn't that the reason the card was given? A. No, I couldn't say that. The card was given at the first meeting that night when he came

there to introduce himself as the man who the rent would be turned over to. That was our impression. Nothing was mentioned about painting, as I remember.

Q. After Mrs. Barber left 1201 Columbia Road you paid your rent to Mr. Massey, did you not? A. Now, what do you mean left, because she never lived, to my knowledge--

96 Q. After she ceased to exercise any control over it, after you say she refused to take your rent? A. Well, in the newspaper she was exposed, a couple of days after, for fraud.

Q. But to whom did you pay your rent after you ceased to have any contact with Mrs. Barber? A. Well, the rent was agreed at this first meeting.

Q. I asked you to whom you paid it. A. I paid it to Vanness Massey.

Q. And did Mr. Massey stay there as long as you did? A. Yes.

Q. Or did he leave before you did? A. As I remember, he left about a week probably before we did.

Q. And you never paid any rent to anybody after he left, did you, for that premises? A. Well, we were told --

Q. You could answer that yes or no. A. I don't understand you.

Q. You could answer that yes or no. Did you ever pay any rent to anybody after Mr. Vanness Massey left the premises? A. No, not after that week, no.

Q. When you left 1201 Columbia Road did you move from there to

97 Hamilton Street where you now live? A. No.

Q. Where did you move to? A. It was 930 Longfellow Street.

Q. And then you moved from there to Hamilton Street? A. No, I didn't.

Q. Where did you move to from Longfellow Street?

MR. GINBERG: I object to this, if Your Honor please.

MR. WILSON: I will withdraw the question. No, I think I will let the Court pass on that.

THE COURT: I think in view of the latitude allowed in cross-

examining, I will let that go.

MR. GINBERG: My objection is based on the ground of irrelevancy, that this is the second moving after the first moving.

THE COURT: I understand the ground of the objection. It is overruled.

BY MR. WILSON:

Q. His Honor ruled that you may answer the question. A. You say why or where?

Q. Where did you move to? A. I moved from there to 1472 Newton Street.

Q. Where? A. Newton, Northwest.

Q. Where did you move to from Newton Street?

98 MR. GINBERG: I object, Your Honor.

THE COURT: I think that is all right. It may be immaterial but it is not doing any harm.

THE WITNESS: I moved from there to Monroe Street.

BY MR. WILSON:

Q. Where did you move to from Monroe Street? A. To California Street.

Q. Where did you move to from California Street?

MR. GINBERG: I renew my objection, Your Honor.

THE COURT: Overruled for the same reason. It may not be too material but I think it is permissible.

THE WITNESS: Moved from there to Belmont Road.

BY MR. WILSON:

Q. What road? A. Belmont Road.

Q. And where to from there? A. From there we moved to Fairmont Street.

Q. And did you move from Fairmont Street to Hamilton Street? A. No. We moved from Fairmont to Girard and from Girard to Hamilton.

Q. How many times during that period did you move altogether? A. Well, you could count them.

MR. GINBERG: Just a minute now.

99 THE COURT: She does not need to calculate it. You brought out the number. You can calculate the number as well as she can.

BY MR. WILSON:

Q. Is it a fact, Mrs. Phillips, that you had to move a good many times on account of the large number of children that you had in the premises? A. No. No, that's not a fact.

Q. What was the cause?

MR. GINBERG: I object. The cause of her moving would be immaterial to any of the issues of negligence in this case.

THE COURT: She has already denied that she moved on account of the children so I think that answers it.

MR. WILSON: He was objecting to my question as to what was the reason for her moving so often.

THE COURT: I am sustaining that objection. I don't think it is necessary to go into that. It is entirely collateral. I let you prove she has made several moves in the latitude I gave you. We don't want to go into the collateral issues of why she moved. It is immaterial.

MR. WILSON: I believe I have no further questions.

* * * * *

105 HOWARD BARNES

was called as a witness and, having been first duly sworn, was examined and testified as follows:

BY MR. GINBERG:

* * * * *

106 Q. And how was it or when was it that you knew that he had sustained an injury? A. I am not positive on time. I would say about one o'clock in the day and I saw something going by the second floor which I thought was a bag of trash.

Q. Pass by what? A. Second floor window, by the window. I thought it was trash. The kids ran down the second floor and told me that Johnny had fallen through the railing so I rushed downstairs to the basement and out the basement to the backyard. There he was laying.

I started not to pick him up but I couldn't let him lay there so I picked him up. I brought him to Mrs. Massey's apartment on the first floor until they called the ambulance.

Q. Now, did you observe anything about Gerard, where he was laying, that was part of the building in any way, or the porches?
A. What do you mean, the ground?

Q. Yes, on the ground where Gerard was lying? A. There was concrete there.

Q. What else, if anything, did you see? A. Oh, yes, I saw two railings, yes.

Q. And describe the railing that you saw. When I say describe, tell us what kind they were, the nature of them. A. Wooden.

107 Q. About what size were they? A. I'd say about two and a half feet by two.

Q. Two what? A. Two inches -- two inches, yes.

Q. Were you able to associate these two railings that you observed with any part of the premises, of the rear of the premises of 1201? A. Yes.

Q. What was it that you associated them with? A. On the third floor I noticed -- before that happened one rail was loose. I noticed that it was loose. So I told my sister about it because it was, you know --

Q. Just answer the question, so that His Honor and the jury may know whether there is any association or connnection between these railings on the ground and the porch on the third floor. A. Yes, they came from the third floor.

Q. How are you able to state that? A. Because I noticed that two railings I picked up and taken upstairs were the same two railings that fell off and I saw two railings were missing.

Q. I show you Plaintiff's Exhibits 8, 9 and 10 and ask you to take a look at them.

108 MR. GINBERG: Those are the exhibits that are the rear of the house, Your Honor.

BY MR. GINBERG:

Q. Are you able to identify and associate the two railings that you saw on the ground with any part of the rear porches that are shown in those photographs? A. Yes, I can.

Q. And with what were they associated? A. Third floor.

Q. And you say you determined that they were the two railings that are missing? A. Yes.

Q. In the third floor rear porch? A. Yes.

Q. What did you do with the railings or the posts? A. That evening I brought them back in the house up to where Mrs. Frances --

Q. Mrs. Phillips? A. Mrs. Phillips I mean to say.

* * * * *

124 STEPHEN S. MADISON

was called as a witness and, having been first duly sworn, was examined and testified as follows:

* * * * *

126 MR. GINBERG: That is all I wanted to ask the witness, Your Honor.

I now wish to read certain interrogatories to the defendant Madison, and answers. These interrogatories were submitted in September of 1956, answered and sworn to on December 17, 1956.

127 (Witness left the stand.)

MR. GINBERG: This is Interrogatory 3:

"Give names and addresses of owners of 1201 Columbia Road, N. W., on May 5, 1954."

Answer: "Thomas A. Stevens, 419 Lexington Avenue, Mobile, Alabama."

Number 6: "Give the name and address of the landlord of said premises between November 1, 1953, and May 5, 1954, and on May 5, 1954."

Answer: "Public Investment Corporation, 1330 U Street."

Number 8: "Were you employed by the owner of premises 1201 Columbia Road, Northwest, to act in any capacity for said premises prior to May 5, 1954?"

Answer: "No."

Number 9: "If answer to 8 above is no, give name and address of the rental agent for said premises between November 1, 1953, and May 5, 1954, if known to you."

Answer: "Public Investment Corporation, 1330 U Street, Northwest."

Interrogatory 11: "Between November 1, 1953, and May 5, 1954, did you state that you would make repairs to the third floor rear porch of premises 1201 Columbia Road, Northwest?"

Answer: "Contractors sent by the rental agent inspected the entire premises and submitted estimates for the work of
128 renovation desired by the owner. This was done, to wit, during the month of March 1954."

Number 12: "Did you inspect the condition of the third floor rear porch of 1201 Columbia --

Your Honor, I will have to read Number 11 again. I read the wrong answer.

Interrogatory 11: "Between November 1, 1953 and May 5, 1954, did you state that you would make repairs to the third floor porch of premises 1201 Columbia Road, Northwest?"

Answer: "Vanness Massey, the tenant in premises 1201 Columbia Road, Northwest, was advised that the owner planned to renovate the entire premises."

12: "Did you inspect the condition of the third floor rear porch of 1201 Columbia Road, Northwest, prior to May 5, 1954? If answer is yes, give date or dates of such inspection and the condition of the porches as you observed."

Answer: "Contractors sent by the rental agent inspected the entire premises and submitted estimates for the work of renovation desired by the owner. This was done, to wit, during the month of March 1954."

* * * * *

143 THE COURT: I think I have gotten your grounds stated sufficiently. The motion for a directed verdict is overruled. The evidence here is circumstantial and very strongly so that the little boy plaintiff aged two years old came through the third floor, the banister there which gave way, and that his body was found, as the witness Barnes testified, lying on the concrete below.

Now, that certainly is a reasonable inference from which a jury could deduce if he fell through the banister. Just plain, ordinary observation would indicate that he did. The fracture of the skull showed that he had a blow, a traumatic injury, which must have resulted from this fall. So I think the issue here is one of negligence, as to whether or not the defendants failed to exercise due care in all the circumstances of the case. Now, that concludes my ruling.

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268 STEPHEN S. MADISON

was recalled as a witness and, having been previously sworn, was examined and testified further as follows:

DIRECT EXAMINATION

* * * * *

269 MR. WILSON: I think in view of the testimony so far the case ought to be dismissed.

THE COURT: State the motion now without arguing because I think it is a jury case.

MR. WILSON: There is no testimony except from Mrs. --

THE COURT: Just make your motion.

MR. WILSON: I move the case be dismissed as to Madison because there is nothing to show that he was acting in an individual capacity, that all of his acts were in behalf of the Public Investment Corporation, who was representing the owner, Dr. Thomas A. Stevens. I think the matter ought to be dismissed as to him.

THE COURT: You have made a very clear statement of the motion, and I think I have to submit it to the jury on that issue. So I will overrule

the motion and note your exception.

* * * * *

298 CHARGE TO THE JURY

THE COURT: * * * *

* * * * *

306 I will define negligence to you in a broad way and I will be a bit more specific on certain propositions of law now and will tell you that upon the evidence in this case the defendant Madison acted as agent for the defendant Public Investment Corporation, and if you find that Madison promised to make repairs to the porch such promises were binding upon the defendant, the Public Investment Corporation.

If you find from the evidence that the defendants had notice of any defective condition of the rear porch and agreed to repair the porch after complaints were made by the mother of the little injured boy as to such condition and that the defendants were negligent in unreasonably delay-

307 ing the making of the promised repairs to the porch whereby the minor plaintiff, the little boy, sustained his injuries, then you should find for him, that is, for the little boy, the plaintiff.

Now, this is quite an important instruction for you to consider carefully. They are all important, but I mean I emphasize this as, I think, being quite important.

As a matter of law the infant plaintiff, because of his age at the time of the accident, cannot be held guilty of contributory negligence or an assumption of any risk or, to use a twenty-five dollar word, an infant two years old is incapax doli, which means incapable of wrong. And that is due to the fact that the two-year-old mind is not well enough matured or advanced -- not well enough advanced to be able to exercise the ordinary care which would be required of an adult or an older person.

The sole issues that you are to consider are whether defendants were negligent in failing to make repairs if you find they promised to make the repairs, and whether such negligence, if so found by you was the proximate cause of the plaintiff's injury.

In your deliberations you should not consider whether the child's parents were negligent and you are not to consider whether any of the

308 mother's or father's conduct contributed to the accident. This is so because under the law any negligence of the plaintiff's parents cannot be imputed to or charged against the infant plaintiff. This is his lawsuit. It is not the lawsuit of his parents. His mother originally had a lawsuit here, but that has been withdrawn; so it is the liability, if any, of the defendant to the child himself that is for you to decide.

If you find from the evidence that the defendants promised to make repairs to the porch and negligently failed to do so and thereby proximately caused the infant plaintiff's injuries you should find for the plaintiff, although you might believe or think that the child's mother or father may have also been negligent in some manner in the happening of the accident.

I hope that instruction is clear to you because it is important.

If you find from the evidence that the third floor porch was in a dangerous condition or in need of repair and that the defendants had knowledge of that condition and need of repair, and you further find from the evidence that the defendants negligently failed to make proper repairs within a reasonable time after having such notice, and you further find that the failure of the defendants to make repairs under the circumstances

309 proximately caused the plaintiff's injuries, you should find for the plaintiff. I might interline here that the proximate cause is a cause without which the accident would not have happened; in other words, unless the cause was there the accident wouldn't have happened. That is proximate cause.

Now, you are instructed that an inference cannot be drawn from a presumption but must be founded upon some fact legally established, which is another way of saying that the jury is not to guess or conjecture and reach a verdict through any such speculative means, but your verdict must be soundly based on evidence in the case.

I am not intimating in giving you this instruction my own views one way or the other or indicating what you will find as jurors in your case, but if you find in favor of the minor plaintiff then of course you should award him damages which will be in such sum as would fairly, fully and adequately compensate him for the injury he has sustained, physical injuries, brain damage, disability, pain and suffering,shock, nervousness and mental anguish which you find were proximately caused by the accident.

If you find that any injuries suffered by him are permanent or reasonably certain to continue to any period in the future you should include in your award such amount as will fairly, fully and reasonably
310 compensate him for the injury, pain and suffering.

There are no mathematical formulae, there are no cast iron rules by which a jury may decipher or conclude as to what the value of the mental anguish and physical suffering may be. The cardinal rule in awarding damages is to render just compensation for the injuries received, applying the principles of law which have been charged.

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